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HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON BANKING AND CURRENCY

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

FIRST SESSION

ON

S. 1698

A BILL TO AMEND THE BANK MERGER ACT SO AS TO PROVIDE THAT BANK MERGERS, WHETHER ACCOMPLISHED BY THE ACQUISITION OF STOCK OR ASSETS OR IN ANY OTHER WAY, ARE SUBJECT EXCLUSIVELY TO THE PROVISIONS OF THE BANK MERGER ACT, AND FOR OTHER PURPOSES

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U.S. GOVERNMENT PRINTING OFFICE
48-140 WASHINGTON : 1965

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AMEND THE BANK MERGER ACT OF 1960

WEDNESDAY, MAY 19, 1965

U.S. SENATE,
COMMITTEE ON BANKING AND CURRENCY,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS,
Washington, D.C.

The subcommittee met at 10:05 a.m., in room 5302, New Senate Office Building, Senator A. Willis Robertson, chairman of the subcommittee, presiding.

Present: Senators Robertson, Douglas, Proxmire, and Bennett.

The CHAIRMAN. The committee will please come to order.

We begin hearings today on my bill, S. 1698, which would amend the Bank Merger Act of 1960 so as to provide that bank mergers are subject exclusively to the provisions of the Bank Merger Act. The bill would exempt mergers under that act, and all mergers duly approved before the passage of that act, from the Sherman Antitrust Act and section 7 of the Clayton Act.

The Bank Merger Act was passed in 1960, after 10 years of legislative efforts, in order to eliminate gaps in the statutory framework which permitted most bank mergers to take place with no review, or no meaningful review, by any Federal bank supervisory agency. At that time it was universally agreed, as every witness testified before the committee, that section 7 of the Clayton Act did not apply to bank mergers. There was also general agreement that the Sherman Act, if it applied to bank mergers at all, was completely ineffective.[1]

The Bank Merger Act provided uniform standards for the consideration of bank mergers, including both banking factors—for example, the public convenience and the necessity for banking facilities—and competitive factors, including tendencies toward monopoly. It required that reports on the competitive factors involved in a proposed merger be given, by the Department of Justice and the other two Federal supervisory agencies, to the Federal supervisory agency handling the application.

It was abundantly clear from the legislative history of the Bank Merger Act over the entire 10-year period it was being considered that Congress definitely intended to apply to bank mergers these general standards, including both the banking factors and the competitive factors, not the limited rule of the Clayton Act, concerned only with competition and not with public convenience and necessity.

Congress made this decision because banking is a strictly regulated industry vested with a public interest.

The importance of banks to commerce, to industry, to the government and to the public as a whole requires restrictions on entry into

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[1] See, for example: "Before amendment, section 7 also had applied only to acquisitions of stock, leaving acquisitions of assets to be governed by supposedly more liberal Sherman Act standards." Donald F. Turner, "Conglomerate Mergers," 78 Harvard Law Review 1313, 1314 (1965).

banking, on branching, on mergers, on holding companies and on the way in which banking is carried on—loan limits, and restrictions on interest rates, investments, and the like. The basic principles of the competitive free enterprise system—free entry, unrestricted competition and survival of the fittest—do not apply to banking.

The Supreme Court, in the *Philadelphia* decision, has rewritten the Clayton Act, contrary to the intention and the understanding of the authors of the Celler-Kefauver amendment of 1950 and of the rest of the Senate and the House. As the Harvard Law Review commented in November 1963, "to apply section 7 to a merger approved by the Comptroller is to gut the congressional scheme." In addition, in the *Lexington, Kentucky* case the Supreme Court radically changed previous interpretations of the Sherman Act and virtually applied Clayton Act criteria to a Sherman Act case.

The result is that the Lexington, Ky., bank is being broken in two, with appalling results to its customers, its officers and employees, and its stockholders. An article from the May 5, 1965, Wall Street Journal showing the problems in Lexington, Ky., will be inserted in the record, at the end of today's hearings. (See p. 55.) A similar threat is posed for the other banks now in court. In addition, under the Supreme Court's ruling in the *Philadelphia* case, every bank merger since the Celler-Kefauver amendment of 1950 may be attacked under the Clayton Act—some 2,000 of them. This could result in a wave of bank catastrophes which might have an effect equal to the 4,000 bank suspensions in 1933.

My bill will bring about the result which Congress intended to reach when we passed the Bank Merger Act in 1960. It will leave the Department of Justice in the bank merger situation, but only as an adviser. It will require consideration of competitive factors and monopolistic tendencies, but it will also call for consideration of public convenience and necessity, and a final decision based on the public interest.

I hope the Congress will give prompt and careful consideration to my bill so that we can remedy the present confusing and unfortunate situation.

This bill looks to the future as well as to the past, in that it applies to everything of this nature that could be done in the future in the matter of mergers.

In other words, it applies to past mergers, of which there have been some 2,000 since 1956, and it applies to any merger of banks in the future. Otherwise I think it is generally considered in banking circles that the future of bank mergers is under the absolute control of the Justice Department. No bank would be foolhardy enough to merge in the future, if this bill does not pass unless the Department of Justice says so and even then some later Attorney General might attach the bank and seek to break it up. The Supreme Court has brought the Department of Justice in as a special agency to regulate and control banking institutions which are already controlled by State laws and Federal laws and which are handled by a number of highly competent men in the financial field dealing with bank mergers.

We have the Federal Reserve Board. We have the FDIC. We have the Comptroller of the Currency. And, of course, whenever one of those agencies is asked to approve a merger, under the present merger law it asks for the advice of the Justice Department, to see

if it can show any good and sufficient reason as to why the merger would reduce or eliminate competition or would promote monopoly.

But the bank merger bill of 1960 treated banks differently from the ordinary corporations. You can't just get together $50,000 or $100,000 or $500,000 and start a bank. You have got to be approved by a Government agency to start.

Any person who can raise enough capital can start a private business for anything he wants, except a few things that may require special license—if you want to sell liquor or something like that. That is regulated a little bit. But I am thinking now about the manufacturing business.

Banks are closely regulated from start to finish at the present time. And one reason that we wanted to have them exempt from the antitrust laws, particularly the Clayton Act, was that we knew the court had held, under that act, that a mere threatened or potential diminution in competition was enough to make the merger illegal.[1]

You can always say that if there had been two banks and now there is only one there has been a reduction of competition. That is theoretical.

But as long as we have the dual banking system, as long as we have the privilege of small banks to ask a correspondent bank in the metropolitan area to help them out on a loan, as long as we have the Federal Reserve System where member banks can borrow to meet unexpected demands, as long as you can pick up the telephone or use the mail and arrange for a bank loan, there can be no monopoly among the banks in the sense that if you had two steel companies in a freight area and they merged and could fix the price of steel, because of freight differentials, and whatnot. That is a monopoly. That would be against the public interest.

But if you have two or three little banks with capital of $50,000 in a community where men want credit far above what any of them can provide, if those are what we call one-man banks, where one man has grown up with the bank and has handled it and has nobody to understudy him because he couldn't afford an understudy, it is definitely in the public interest to let two of those banks merge or let one of them merge with somebody somewhere else so that they can better serve the credit needs of the area.

And that is what my banking merger bill of 1960 contemplated. That is what it intended to do.

We made it perfectly clear in the debate on that bill that the Clayton Act should not apply. And I was glad that the majority leader, then the distinguished Senator from Texas, Mr. Johnson, made the statement on the floor that the Clayton Act was not to apply.

And as I recall, after we defeated a provision offered by the Senator from Wyoming, Senator O'Mahoney, there was not a single vote cast against the bill in the Senate on final passage.

Then we find all of these antitrust cases suddenly brought by the Justice Department, and two of them went to the Supreme Court. And they held both antitrust laws applied.

That is the most astounding thing I—No, it isn't either, because I couldn't be astounded. But it was rather astounding that they said both the Sherman and the Clayton Acts applied to bank mergers

[1] See excerpt from "Antitrust Policy, an Economic and Legal Analysis," Kaysen and Turner, 1959, at p. 220, below.

which the Comptroller had approved because he found they were in the public interest and would promote the growth of the cities where they were located.

And then they ordered them to be split up. You have got to divide up the computers. You have got to divide up the trust accounts. One would get one trust account, and the other would get the next trust account. You have to divide up the depositors. One bank gets some of the depositors, and the other gets others.

Everybody knows you are dealing with a physical impossibility. It is just a plain mess. And who gains by it? Nobody is going to gain.

Who will get hurt? Well, the community gets hurt when you destroy the banking resources there. And all the bank's correspondents get hurt. And all the stockholders get hurt. Of course, some of them will get wrecked. They just don't know how to unscramble this omelet.

To bring some order out of chaos, I have introduced this bill. I did not introduce it until I discussed it with a lot of informed people. We discussed various phases of how best to approach this subject.

We did the same thing back there in 1956 when we thought there should be a general revision of all the banking laws relating to financial institutions. We had our staff study what all was involved. I asked all the regulatory agencies to study and submit to me recommendations. I selected an advisory committee of 23 outstanding men of this Nation, and they studied it.

We had the free services of attorneys of some of the biggest banks in this Nation working on this bill.

We had public hearings, largely attended and conducted by that advisory committee.

As a result of 18 months of work on that bill, we passed without a single dissenting vote what was called the Financial Institutions Act of 1957. That was the background of that bill.

That bill never got out of the House Banking and Currency Committee.

I find this news item from the business and finance section of today's issue of the New York Herald Tribune:

> A Senate bill exempting banks from antitrust laws has received what might be a death blow.
>
> Representative Wright Patman, Democrat, of Texas, as chairman of the House Banking and Currency Committee, will soon make a speech against the bill, it was learned here yesterday.
>
> In a telephone interview, Mr. Patman said, "If you exempt banks from antitrust, you might as well also shoot the policeman on the corner."

Well, I won't read any further. I reckon if you shoot the policeman you have gone about far enough.

But, anyway, this morning, we had a little meeting of what we call the Senate breakfast group, and I was the leader. And I chose as my subject faith. And I used as an example an old Arab sheik who lived in a city named Uz.

That was in the olden empire of Babylonia, probably 2,500 years ago. Nobody knows just when he lived.

But he believed in God. He was one of the first people out there who did. And he wrote a very wonderful book. And after God had given the Devil the privilege to try him—and God is often very willing to let the Devil try us, you know, and you must be prepared for that—

Job went through all sorts of adversity. He lost his house. He lost his children. He lost his slaves. He lost his servants. He lost everything he had. And in addition to that, he got covered with boils and whatnot.

His wife said, "Job, curse God and die."

And Job said, "Though he slay me, yet will I trust in him."

Well, I don't have quite that much faith in Chairman Martin of the Federal Reserve Board, but I haven't lost faith in him and in his wisdom about banking methods.

Naturally I felt very gratified when he wrote me a letter endorsing my bill, and I am not going to admit at this point that the bill can't be enacted into law.

I have faith that there will be others besides myself with confidence in Chairman Martin, in the FDIC, in the Comptroller of the Currency, in the American Bankers Association.

Members of Congress have received over 2,000 letters from bankers all over the Nation endorsing this bill.

I just have not yet lost my faith that this Congress will approve this proposal.

At this point I would like to insert the language of the bill and the Federal Reserve Board report which is the only report we have so far received. In accordance with our usual practice, requests for comments on the bill were made on April 6 right after the bill was introduced.

(The bill and the Federal Reserve Board report follow:)

89TH CONGRESS
1ST SESSION

S. 1698

IN THE SENATE OF THE UNITED STATES

APRIL 5, 1965

Mr. ROBERTSON introduced the following bill; which was read twice and referred to the Committee on Banking and Currency

A BILL

To amend the Bank Merger Act so as to provide that bank mergers, whether accomplished by the acquisition of stock or assets or in any other way, are subject exclusively to the provisions of the Bank Merger Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 18 of the Federal Deposit Insurance Act is amended by adding immediately before the last sentence of that subsection the following sentence: "The authority to approve mergers, consolidations, and acquisitions of stock or assets and assumptions of liabilities, herein conferred on the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Corpo-

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ration shall be exclusive and plenary, and any banks participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws, including the Sherman Antitrust Act and the Clayton Act, with respect to such transaction, whether accomplished by the acquisition of stock or the acquisition of assets, or in any other way, and whether such transaction has been or is hereafter consummated."

SEC. 2. No proceedings shall hereafter be instituted or prosecuted under the antitrust laws, including the Sherman Antitrust Act and the Clayton Act, against any bank insured under the Federal Deposit Insurance Act by reason of or with respect to any merger, consolidation or acquisition of stock or assets and assumption of liabilities consummated before May 13, 1960, pursuant to approval of the appropriate State or Federal bank supervisory authority.

BOARD OF GOVERNORS, OF THE
FEDERAL RESERVE SYSTEM,
Washington, D.C., April 27, 1965.

Hon. A. WILLIS ROBERTSON,
Chairman, Committee on Banking and Currency,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This refers to your requests of April 6 and 7, 1965, for a report on your bill, S. 1698, which would amend the Bank Merger Act (12 U.S.C. 1828(c)) to exempt bank mergers from the Federal antitrust laws.

Under the bill, the authority of the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation to approve mergers and other transactions covered by the Bank Merger Act would be "exclusive and plenary." Banks participating in transactions approved under the act would be relieved by the bill, as to such transactions, from the operation of the Sherman Antitrust Act and the Clayton Act. This would be true whether the particular transaction "has been or is hereafter consummated." The bill also would exempt from the antitrust laws any bank merger or similar transaction consummated pursuant to the approval of the appropriate State or Federal bank supervisory authority prior to the date of enactment of the Bank Merger Act (May 13, 1960). In introducing the bill on April 5, 1965, you indicated that it is intended "to be applicable not only to future mergers but to all mergers heretofore consummated pursuant to appropriate regulatory approval including mergers now under attack by the Department of Justice under the antitrust laws."

Because banking is a licensed, strictly regulated, and closely supervised industry that offers problems acutely different from other types of businesses, the Congress,

in enacting the Bank Merger Act, deliberately chose to place the authority to pass on bank mergers in the Federal bank supervisory agencies. Of course, the competitive effects or possible antitrust implications of bank absorptions obviously were the major reason prompting adoption of the measure. It is abundantly clear from the legislative history of the act, however, that the Congress did not believe the public interest would be served best if the legality of bank mergers were to be tested by competitive factors alone, to the exclusion of banking factors, including offsetting benefits to the public.

The Bank Merger Act contains no specific exemption from the antitrust laws for bank mergers, and the legislative history of the act indicates that this was not an inadvertence. On the other hand, and as the legislative history emphasizes, at the time of enactment of the act it was generally understood that section 7 of the Clayton Act, as amended in 1950, was inapplicable to bank mergers, and there was little or no experience by which to judge the usefulness of the Sherman Act in dealing with such matters.

In any event, the Congress specifically rejected a proposal that antitrust standards be adopted as the criteria for approvals of bank mergers, as well as a proposal that the Attorney General be permitted to intervene and obtain court reviews in bank merger cases pending before the Federal bank supervisory agencies. Instead, the Congress, in deciding to rely on the requirement for advance approvals by the banking agencies, concluded that agency consideration in such cases of the antitrust implications would be aided sufficiently by the requirement in the Bank Merger Act for advisory reports from the Attorney General on the competitive factors involved. And, in the words of your committee in reporting the measure: "The advance approval feature is important in halting bank acquisitions before they are consummated and in preserving the depositors' confidence in an institution which might otherwise be destroyed by an attempt to unscramble assets after an acquisition has been completed." (S. Rept. 196 on S. 1062, Apr. 17, 1959, p. 22.)

Well known are the problems that have resulted from the recent antitrust court cases involving bank mergers. This litigation makes unmistakably clear that banks and their customers now face the uncertainty that, even though merger proposals receive the advance approval of the appropriate Federal banking agency, the transactions are subject to veto in the courts on the basis of competitive or antitrust considerations alone. Indeed, protracted antitrust litigation to unscramble a merger risks detrimental effects on the bank involved and the public.

The Board believes that the Congress should examine the situation with a view to prompt correction and urges enactment of legislation such as that proposed in your bill.

Should the Congress, however, be unable to agree on the approach to the problem proposed in S. 1698, it might wish to consider other, although less positive, measures. One such possibility would be to amend the Bank Merger Act to allow a specified time necessary for the filing of an antitrust action in court to prevent consummation of an approved transaction, after which, in the absence of such an action, the merger could be consummated and would be exempt from the antitrust laws. Because the Attorney General receives ample notice of pending mergers under the procedure in the act for the submission of competitive factors reports, the specified period should be relatively short.

Sincerely yours,

WM. McC. MARTIN, JR.

The CHAIRMAN. Chairman Martin, we are pleased to have you with us here this morning, and we will be glad to hear what you have to say about the merits or demerits of S. 1698.

Senator BENNETT. Mr. Chairman, before Chairman Martin begins, may I offer for the record a brief statement expressing my faith in the chairman and his bill and the bank regulatory agencies.

The CHAIRMAN. The chairman has frequently said that the distinguished Senator from Utah, the ranking Republican on his committee, is what he calls his right bower. And he is always pleased when any proposal that the chairman makes is endorsed by the Senator from Utah, not only because he has shown great perspicacity in private business—he was at one time president of the National Association of Manufacturers.

Senator BENNETT. Yes, I have to confess.

The CHAIRMAN. Well, that is a group that still believes in private enterprise. They also think that Woodrow Wilson wasn't so far off when he said, "I don't want a smug lot of experts sitting down behind closed doors in Washington explaining profits to me."

Anyway, I think he has got a pretty good, sound view. Would you read your statement? I would like to hear it.

Senator BENNETT. I would like to go on record as being in support of the bill that is before the subcommittee as introduced by the chairman.

There is no doubt that the present situation in which the Justice Department brings action against banks which have merged after receiving permission from the banking agencies involved is undesirable.

The chairman's bill, S. 1698, makes clear the intent of Congress that the Bank Merger Act of 1960 was to be the antitrust act for bank mergers. It was the intention of Congress in passing that act that a balanced investigation be made by the bank regulatory agencies involved and that the investigation would consider the financial history and condition of the institution, the adequacy of its capital structure, its future earnings prospects, and the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers were consistent with the act.

In addition, the agencies were to consider whether the proposed merger would lessen competition or tend to create a monopoly, and they were to get reports on competitive factors from the Attorney General.

The Congress made it clear that a lessening of competition would not be considered an overriding or controlling factor in and of itself, but that it must be considered as just one of the several factors which would go into the balanced judgment of the banking agencies and the proposed merger was to be approved only if it was found to be in the public interest by the Federal bank supervisory agency designated by the Congress.

It was made clear at the time of the 1960 act that it was the intent of Congress that the various banking factors in any particular case might outweigh the competitive factors. However favorable or unfavorable the competitive factors may be, they in and of themselves were not the controlling factors in the decision.

It was also pointed out at that time that the banking agencies were not bound by the report of the Attorney General in their consideration of competitive factors.

I am of the opinion that the Supreme Court in its ruling in the *Lexington* and *Philadelphia* cases has nullified the intent of Congress in passing the Bank Merger Act. The Department of Justice seems to have been given a final veto power over any bank merger which it deems to lessen competition.

I am convinced that members of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency are competent public servants and that they are able to determine on the basis of all factors the advisability of any particular bank merger.

It is undesirable and unfortunate to have another Federal agency attacking the decisions made by these banking agencies on the basis of the Clayton and Sherman Acts.

This bill would clarify again the intent of Congress and make it possible for banks to know before they make a contemplated merger whether it is appropriate or not and thus avoid the confusion that has arisen from the present uncertainty and avoid the chance of damaging lawsuits.

The CHAIRMAN. Thank you, Senator Bennett. That is a very clear and pertinent comment on this bill.

Now we will be glad to hear from the distinguished Chairman of the Federal Reserve Board, Mr. Martin.

STATEMENT OF WILLIAM McC. MARTIN, JR., CHAIRMAN, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ACCOMPANIED BY JEROME W. SHAY, ASSISTANT GENERAL COUNSEL, AND BRENTON C. LEAVITT, ASSISTANT DIRECTOR, DIVISION OF EXAMINATIONS.

Mr. MARTIN. I am here this morning in complete support of this bill.

It might be helpful first to summarize briefly the Bank Merger Act of May 13, 1960. The act prohibits the merger, consolidation, acquisition of assets, or assumption of liabilities of one insured bank with or by another such bank without the prior approval of the Comptroller of the Currency, the Board of Governors, or the Federal Deposit Insurance Corporation, depending on whether the resulting, acquiring, or assuming bank is to be a national bank, a State member bank, or a nonmember insured bank.

In determining whether to approve or to disapprove a merger application, the appropriate agency is required by the act to consider, as to each of the banks involved, its financial history and condition, the adequacy of its capital structure, its future earnings prospects, the general character of its management, whether its corporate powers are consistent with the purposes of the Federal Deposit Insurance Act, the convenience and needs of the community to be served, and the effect of the transaction on competition, including any tendency toward monopoly. The agency may approve the transaction only if, after considering all of the factors just mentioned, it finds the transaction to be in the public interest.

Before acting on a merger application, the action agency is required by the act to request from the other two Federal bank supervisory agencies and from the Attorney General advisory reports on the competitive factors involved in the case. Under the statute, the advisory reports are not recommendations as to what action should be taken by the appropriate agency on the merger application, but are limited to the competitive factors only. The advisory reports on the competitive factors must be supplied to the action agency normally within 30 days of the request.

The act also provides for public notice of the filing of merger applications and for special handling of any application involving a probable bank failure or other emergency requiring expeditious action.

Of course, if a merger application of a State member bank or a nonmember insured bank is rejected by the State banking authority,

that closes the matter and dispenses with any need for action on the case under the Federal bank merger statute.

S. 1698 would make "exclusive and plenary" the authority of the Board of Governors, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation to approve or to disapprove proposed mergers and other similar transactions covered by the Bank Merger Act. Banks participating in transactions approved under the act would be relieved by the bill, as to such transactions, from the Sherman Antitrust Act and the Clayton Act. This would be true whether the particular transaction "has been or is hereafter consummated."

Any bank merger or similar transaction consummated prior to the date of enactment of the Bank Merger Act (May 13, 1960) following approval of the transaction by the appropriate State or Federal bank supervisory authority, also would be exempted from the Federal antitrust laws by the bill.

In a very real sense, this bill would merely restore to the bank merger situation the rules that were generally understood to apply at the time of enactment of the Bank Merger Act in 1960 and until the decision in June 1963 of the U.S. Supreme Court in the *Philadelphia National Bank* case that section 7 of the Clayton Act applied to bank mergers, even though approved under the 1960 statute (374 U.S. 321). The best evidence of this is in the legislative history of the Bank Merger Act. I want to review that history briefly.

The report of your committee in 1959 and that of the House Committee on Banking and Currency in 1960 leave no doubt that the competitive effects or possible antitrust implications of bank mergers were the major reasons prompting adoption of the Bank Merger Act. A main emphasis of the entire legislative history—and rightly so—is that competition is an indispensable element to a strong and progressive banking system. This and the important gaps that existed prior to 1960 in the Federal law governing bank mergers were stressed as the reasons why legislation was necessary.

The special needs and characteristics of banking, however are the central theme running throughout the legislative history. It was emphasized that banking is a licensed, strictly regulated, and closely supervised industry that offers problems acutely different from other types of business, whether regulated or not. Because of this, the Congress, in enacting the Bank Merger Act, deliberately chose to place the authority to pass on bank mergers in the Federal bank supervisory agencies.

The most troublesome issue was the standards by which the legality of bank mergers was to be tested. As the committee reports explain, sections 1 and 2 of the Sherman Antitrust Act prohibit unreasonable restraints of trade in interstate commerce and monopolies and attempts to monopolize in any parts of such commerce, while corporate acquisitions in the circumstances described in section 7 of the Clayton Act are prohibited where the effect "may be substantially to lessen competition, or to tend to create a monopoly."

It is abundantly clear, however, from the legislative history that Congress felt that it would not be in the public interest for the legality of bank mergers to be tested by competitive factors alone to the exclusion of banking factors, including offsetting benefits to the public.

Indeed, the Congress understood specifically that there would be situations in which "approval of the merger would be in the public

interest, even though this would result in a substantial lessening of competition." (S. Rept. 186, Apr. 17, 1959, pp. 19–24; H. Rept. 1416, Mar. 23, 1960, pp. 10–13.)

No exemption from the antitrust laws is contained in the Bank Merger Act. When the act was passed in 1960, there seemed to be little reason for such an exemption. At that time, as the legislative history clearly shows, it was generally agreed that section 7 of the Clayton Act, as amended by the Celler-Kefauver Act in 1950, was inapplicable to bank mergers, normally accomplished through asset acquisitions rather than stock acquisitions. For example, testimony for the Department of Justice was that section 7 "is little help" in stopping bank mergers because it "covers bank stock acquisitions." (Hearings on S. 1062, House Committee on Banking and Currency (1960), p. 162.) In addition, there was little or no experience by which to judge the usefulness of the Sherman Act in dealing with bank mergers.

As you have emphasized on various occasions, Mr. Chairman, the Congress specifically rejected proposals that antitrust standards be adopted as criteria for approvals of bank mergers. Also rejected by the Congress was a proposal that the Attorney General be permitted to intervene and obtain court reviews in bank merger cases pending before the Federal bank supervisory agencies. Instead, the Congress decided that the proper role for the Department of Justice in bank merger cases would be fulfilled by submitting advisory reports on the competitive factors to the banking agencies for consideration by them in deciding whether to approve or to disapprove merger applications.

In view of the attempts which certain banks are having to make, or may have to make, to unscramble their affairs as a result of antitrust litigation subsequent to agency approvals of mergers, a statement in your committee's 1959 report is especially significant. In the words of your committee:

> The advance approval feature is important in halting bank acquisitions before they are consummated and in preserving the depositors' confidence in an institution which might otherwise be destroyed by an attempt to unscramble assets after an acquisition has been completed. (S. Rept. No. 196 on S. 1062, Apr. 17, 1959, p. 22.)

My study of the situation makes it crystal clear to me that the test for the validity of bank mergers today is not what the Congress thought it was to be at the time it enacted the Bank Merger Act. The *Philadelphia National Bank* case, cited above, the decision in April 1964 of the Supreme Court in the *First National Bank and Trust Company of Lexington* case (376 U.S. 665), and the decision on March 10 of this year of the Federal district court in New York in the *Manufacturers Hanover Trust Company* case, leave no doubt that bank mergers are now subject to both the Sherman Act and section 7 of the Clayton Act. This litigation—as well as other pending antitrust court cases to overturn bank mergers—makes it unmistakably clear that banks and their customers now face the uncertainty that, even though merger proposals receive the advance approval of the appropriate Federal banking agency, the transactions are subject to veto in the courts on the basis of competitive factors alone.

The problems that have followed in the wake of these court cases are well known. A high degree of public confidence is peculiarly

essential to a sound and vigorous banking structure. Indeed, the uncertainty regarding agency approvals and protracted antitrust litigation to unscramble mergers risk detrimental effects on the banks involved and the public. As previously indicated by the quotation from your committee report, this risk was not one that the Congress thought would materialize when it enacted the Bank Merger Act. S. 1698 would remedy this situation.

The merger of Manufacturers Trust Co. and the Hanover Bank, which the Board approved under the Bank Merger Act in September 1961, was held to violate the Federal antitrust laws last March—that is, March 10, 1965—by the Federal district court in New York. That merger is the only one approved by the Board under the Bank Merger Act that has been the subject of antitrust litigation.

Since November 1961, the Board has had a rule under which mergers approved by it cannot be consummated, except in special situations, until 7 days have elapsed after public release of the Board's action approving the transaction. (12 C.F.R. 252.2(f)(5).)

Although not required by any statute, this rule was adopted to reduce the prospects of having to unscramble a merger that, subsequent to its approval by the Board, was made the subject of litigation under Federal antitrust laws. The Department of Justice, of course, is assured specifically of advance notice of pending bank merger cases under the requirement in the Bank Merger Act for advisory reports from the Attorney General. The Board gives careful consideration to the advisory reports of the Attorney General, as well as to those of the other two banking agencies, in determining whether to approve or disapprove a particular transaction.

The Department's Antitrust Division occasionally asks for more information concerning a particular proposal pending before the Board, and this information is obtained and supplied by the Board. In some cases where the Board has received additional information regarding an application after transmittal of the statutory requests for competitive-factor advisory reports, the Board has requested a further expression of views from the other banking agencies and the Attorney General in the light of the additional information. Furthermore, as experience has developed under the Bank Merger Act over the years, there has been informal discussion between the staff of the Board and the staff of the Justice Department where the Antitrust Division has had serious question, under the antitrust laws, regarding a particular proposal and the desirability of such discussion has been indicated.

While the 7-day provision in the Board's rules and other procedures of the kinds that I have mentioned minimize the risk of having to unscramble a merger that has been previously approved by the Board, these administrative measures cannot eliminate that risk. The recent court decisions make it clear that bank mergers approved by the appropriate Federal bank supervisory agency under the Bank Merger Act are not immune from antitrust proceedings, and we do not know of any Federal statute of limitations on actions to enforce the antitrust laws.

The recent court decisions involving bank mergers have underlined the fact that, in the antitrust field, such matters as banking factors and offsetting benefits to the public are virtually ignored. This, of course, marks the basic difference between the responsibility of the

Federal banking agencies under the Bank Merger Act and the antitrust functions of the Attorney General and the courts. In deciding a case under the Bank Merger Act, the appropriate Federal bank supervisory agency must arrive at a balanced decision of approval or disapproval based upon a consideration of all of the factors specified in the act. Sound banking and the needs of the public, as well as effect on competition, must be taken into account. To process merger cases in a way which, essentially, would give consideration only to competitive or antitrust factors, to the exclusion of other proper considerations, would be contrary to the responsibility vested in the action agency by the Bank Merger Act.

In the Board's judgment, therefore, no administrative steps can be taken appropriately under existing law that would effectively bar actions pursuant to the antitrust laws to upset bank mergers previously approved by one of the Federal bank supervisory agencies under the Bank Merger Act.

For the reasons I have indicated, the Board supports this bill and hopes that it will be favorably acted upon by the Congress. In its report to you on the bill, you will recall, Mr. Chairman, that the Board urged that the Congress examine the situation that has developed since 1963 with a view to prompt correction along the lines of your bill.

The Board's report also mentioned the possibility of some other approach to the problem should the Congress be unable to agree on the approach proposed in your bill. As the report pointed out, one such possibility would be to amend the Bank Merger Act to allow a specified time within which an antitrust action might be brought to prevent consummation of an approved merger and, if such an action were not filed during that time, the merger could be consummated and would be exempt from any proceeding under the antitrust laws. Because the Attorney General receives ample notice of pending mergers under the procedures of the Bank Merger Act for advisory reports, the specified period in any such alternative approach should be relatively short.

Such an alternative, however, would be a less positive approach than S. 1698. Moreover, such an alternative, unfortunately, would incorporate specifically into the Bank Merger Act two different—and logically inconsistent—standards for bank mergers. Indeed, the Department of Justice would be obliged by the antitrust laws to intervene to block a bank merger in the very same circumstances in which a Federal banking agency would be required by another act of Congress—the Bank Merger Act—to approve the transaction. Thus, two arms of the Government, carrying out their statutory duties, would work at cross purposes, with banks and the communities they serve caught in a legal crossfire.

Clearly, this sort of conflict should be avoided, as it would be by enactment of S. 1698.

The CHAIRMAN. Thank you very much, Governor.

Are there any questions? Senator Proxmire?

Senator PROXMIRE. I, of course, share the respect and admiration which the chairman and Senator Bennett have expressed for you, Mr. Martin. There's no question of your competence in this field.

You are confined under the bill we passed in 1960, as I understand it, to State member banks, not national banks or State nonmember

banks, which are under the Comptroller of the Currency or the FDIC. Is that correct?

Mr. MARTIN. That is right so far as——

Senator PROXMIRE. So the State banks which are not insured——

Mr. MARTIN. We handle State member banks that are insured, and most nonmember State banks are also insured.

Senator PROXMIRE. Who handles the noninsured independent banks, then?

Mr. MARTIN. Noninsured independent banks? They are under neither the Board nor the FDIC. They would not be under either; you see.

Senator PROXMIRE. Who would cover them?

Mr. SHAY. The Bank Merger Act, Senator, if I may—that is, the 1960 legislation—applies only to insured banks.

Where the resulting bank in a merger is a State insured bank, that is, not a member of the Federal Reserve System, the FDIC has to act on the application.

Senator PROXMIRE. The Comptroller of the Currency has jurisdiction over national banks?

Mr. SHAY. Right.

Senator PROXMIRE. The Board of Governors has jurisdiction over State member banks?

Mr. MARTIN. Right.

Senator PROXMIRE. And the Federal Deposit Insurance Corporation has jurisdiction over nonmember insured banks; is that correct?

Mr. MARTIN. That is right.

Senator PROXMIRE. Do you feel that the provisions in this bill would need to be supplemented by any other legislation at all or any particular action on the part of the Board of Governors to give you a competence to assess the significance of competition?

What I am getting at is that, as I understand it, the Federal Reserve Board has not had explicit experience, because you just haven't been given the legislative authority in the past—is that correct—to rule in merger cases?

You did until the Supreme Court acted in the Girard case, but except for that brief period you are not an agency that has had experience in the merger field before? Is that correct?

Mr. MARTIN. Oh, we have had a lot of experience in this, Senator.

Senator PROXMIRE. Under what legislation?

Mr. MARTIN. Well, under this act alone and also——

Senator PROXMIRE. I say you had the experience between the enactment of the act in 1960 and the——

Mr. MARTIN. And to date.

Senator PROXMIRE (continuing). The Supreme Court decision which gave the Justice Department the definitive word on bank mergers. Is that correct?

Mr. MARTIN. That is right, the Justice Department——

Senator PROXMIRE. Can you tell me approximately how many applications there were before the Board of Governors by these State member banks during this period?

Mr. MARTIN. I can put into the record a table showing the numbers.

Senator PROXMIRE. I have it here. As I understand it, you gave 142 approvals. Is that correct? Seventeen applications were denied, one was withdrawn, and the rest apparently were approved.

Mr. MARTIN. That is right. And in addition, seven proposed mergers of State member banks were denied by State bank supervisors before any application was even made to the Board. This can be put in the record.

The CHAIRMAN. At this point we will place in the record the figures relating to mergers approved and denied by the Federal Reserve System, by the Comptroller of the Currency, and by the Federal Deposit Insurance Corporation.

(The figures referred to follow:)

1955-65

	Approved	Denied	Total mergers
1955			231
1956			189
1957			161
1958			152
1959			169
1960 (to May 13)			83
1960 (May 13 to Dec. 31):			
Federal Reserve	17	3	
Comptroller	58	1	
FDIC	21	0	
Total	96	4	96
1961:			
Federal Reserve	32	4	
Comptroller	72	2	
FDIC	31	0	
Total	135	6	135
1962:			
Federal Reserve	37	5	
Comptroller	110	6	
FDIC	44	0	
Total	191	11	191
1963:			
Federal Reserve	31	3	
Comptroller	89	2	
FDIC	31	2	
Total	151	7	151
1964:			
Federal Reserve	16	2	
Comptroller	88	0	
FDIC	29	0	
Total	133	2	133
1965 (through May 12):			
Federal Reserve	9	0	
Comptroller	33	1	
FDIC	17	0	
Total	59	1	59

NOTE.—Figures to May 13, 1960, from FDIC letter of May 13, 1965. Later figures from Comptroller, Federal Reserve Board, and FDIC.

Figures do not reflect applications for reconsideration. Figures also do not reconcile with subseqent totals for absorbed banks because the latter may include acquisitions by noninsured banks, and because of differences involving multiple acquisitions in a single transaction or because of partial acquisitions.

	Approved	Denied	With-drawn	Rescinded	Denied by State
Federal Reserve	142	17	1		7
Comptroller	450	12	1	1	0
FDIC	173	2			?
Total	765	31	2	1	7

Action on merger applications before Board of Governors of the Federal Reserve System (May 13, 1960 through May 12, 1965)

	Approved	Denied	Withdrawn	Denied by State banking department
1960 (from May 13)	17	3		
1961	32	[1] 4	1	3
1962	37	5		1
1963	31	3		1
1964	16	2		1
1965 (through May 12)	9			1
Total	142	17	1	7

[1] Reflects adjustment for 1 application denied in 1961 but later approved on reconsideration in 1962.

THE COMPTROLLER OF THE CURRENCY,
THE ADMINISTRATOR OF NATIONAL BANKS,
Washington, D.C., May 13, 1965.

MATTHEW HALE,
Chief of Staff,
Senate Committee on Banking and Currency,
Washington, D.C.

DEAR MR. HALE: Pursuant to your recent telephone request, I am enclosing herewith a tabulation of the mergers, consolidations, and purchases of assets and assumption of liabilities disposed of by this office between May 13, 1960, and May 12, 1965. These figures are tabulated by the years and with a total.

If I can be of any further assistance to you, please do not hesitate to call upon me.

Very truly yours,

R. J. BLANCHARD,
Deputy Comptroller of the Currency.

Disposition of applications for consolidations, mergers, and purchases from May 13, 1960, through May 12, 1965

	1960 [1]	1961	1962	1963	1964	1965	Total
Approved	58	72	110	89	88	33	450
Denied	1	2	6	2	0	1	12
Withdrawn	1	6	0	3	3	1	14
Rescinded	0	0	0	1	0	0	1
Pending						11	11
Total							488
Pending							−11
Total							477

[1] Following May 13, 1960.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, May 13, 1965.

Mr. MATTHEW HALE,
Chief of Staff, Committee on Banking and Currency,
U.S. Senate, Washington, D.C.

DEAR MATT: In answer to your request for information concerning bank mergers, the following figures supplement the statistics used in the 1960 consideration of the Bank Merger Act:

Banks ceasing operations—Absorptions, consolidations, and mergers

1955	231	1960	132
1956	189	1961	138
1957	161	1962	183
1958	152	1963	154
1959	169	1964	149

Since the Bank Merger Act became effective, the Federal Deposit Insurance Corporation has taken the following action on proposed bank mergers:

	Approvals	Disapprovals		Approvals	Disapprovals
1960	21		1964	29	
1961	31		May 12, 1965	17	
1962	44				
1963	31	2	Total	173	2

The Corporation does not maintain any statistics on the number of possible mergers where the resulting bank was a nonmember bank that had been terminated before formal application was made. It is a fact, however, that in many instances when banks are contemplating merger transactions, preliminary discussions are held at our field offices, and occasionally, at our Washington office. If the proposal contains obvious elements that would seriously mitigate its approval, such items would be brought to the proponent's attention. Unfortunately, we have no way of accurately estimating the number of mergers that might have been so discouraged.

We will be most happy to furnish you with any additional information or assistance you may need.

Sincerely yours,

K. A. RANDALL, *Chairman.*

Senator PROXMIRE. Now, I am somewhat concerned with what I understand you to say, that competition would not be the controlling factor.

Mr. MARTIN. That is right.

Senator PROXMIRE. If this is enacted it would not be the controlling factor.

And you list on the first page here six factors which are to be considered.

Mr. MARTIN. That is right.

Senator PROXMIRE. The last of these is competition. This I take it is from the legislation, so it is not your list of priority necessarily. But does this indicate any priority?

For example, would adequacy of capital structure be necessarily more significant than the effect of the transaction on competition?

Mr. MARTIN. No, there is no priority reflected in the listing on any of these. It is the overall, the composite judgment that has to revolve around the public interest.

Senator PROXMIRE. Now, you have six considerations here, only one of which is competition. I take it on the basis of this list of criteria, and in view of the statement that you make on page 4 where you explicitly say that section 7 of the Clayton Act prohibits a merger which would "substantially lessen competition," that phrase, of course, would be no longer applicable to such mergers if this legislation is passed?

Mr. MARTIN. That is right. That would be the effect of it.

Senator PROXMIRE. Under these circumstances, it is highly likely that there will be cases in which the first five criteria here will outweigh criterion six. In other words, the effect would be to lessen competition, and yet you will approve them?

Mr. MARTIN. That is right.

Senator PROXMIRE. In 1960, as you may recall—I know you had a chance to review the report—Senators Clark, Douglas, Muskie, and I filed supplementary views. We concurred with the bill. The chairman is exactly right. We voted for it. But we expressed some concern

that the Department of Justice seemed to have too feeble a role in our judgment.

We did not say that the Clayton Act should be controlling. We did indicate, however, that perhaps the Department of Justice should play a larger role.

One of the points we brought out is that the number of banks which have most of the banking assets in many communities is quite small.

In my own city of Milwaukee at that time—it may be different now—one bank had 48 percent of the banking assets. The four biggest banks had about 83 percent.

I found this typical. It was not unusual at all. This was the standard situation—one bank with about half of the assets in the community.

Since that time there have been a number of mergers. Before that time there were some very, very large mergers of very big banks.

I am wondering if you can explain to me the justification for the impression I get that up until Mr. Saxon became a little more aggressive in chartering banks the number of banks had not increased. It seemed to diminish, although the economy had grown enormously and the banking business had greatly expanded.

It seems that competition had failed somehow.

Mr. Martin. Well, not necessarily that competition had failed, but the size of communities and the need for types of service in the community had unquestionably altered as the country had grown to some extent.

There have been small banks that have found it difficult to earn a living, if you want to put it that way, in the type of business they have been doing previously, as the communities have expanded. That has been a factor that has been back of this.

And we have had a great many banks in this country. This country has had 14,000 or 15,000 banks, Senator, which is a large number of banks. And there has not been any serious diminution of number of banks. We still have today in the neighborhood of—I would not know the exact figure—over 13,000 Mr. Shay says.

Senator Proxmire. How many years ago did you say there were 15,000?

Mr. Martin. Before the Bank Merger Act—I would say we have been in the neighborhood of more than 12,000 for many, many years.

Senator Proxmire. You feel because of the change in transportation, because of the automobile, bceause of the fact people are doing their shopping by and large in bigger areas, and so forth, that the number of banks nationally in the whole Nation has necessarily diminished? It is understandable why the number has diminished? People can do their banking in a city that is 25 or 50 miles away quite conveniently today, while in the horse-and-buggy days they couldn't get that far away? Is that right?

Mr. Martin. I think that is one of the major factors, yes.

Senator Proxmire. I think that is correct.

But I am still concerned about a situation that finds so many cases where one bank has such a very large propostion of all the banking assets in the community, and I wonder, in the light of this, if the Congress can't adopt some amendment perhaps to this bank merger bill, which I think has a lot of justification.

The CHAIRMAN. Would the Senator yield there?

Senator PROXMIRE. Yes.

The CHAIRMAN. I am sure he does not want to predicate a question based upon misinformation to this distinguished witness.

Senator PROXMIRE. No indeed.

The CHAIRMAN. It is very natural for the Senator to assume that if there has been a merger of 2,000 banks we don't have as many banks now as before the bank merger bill. But that just doesn't happen to be true.

On December 31, 1955, there were 13,237 insured commercial banks.

On December 31, 1959, just before we passed the merger bill we had 13,114 insured commercial banks. Now we have 13,493.

I will get from the FDIC a full report on the number of banks, mergers, and suspensions since 1921.

(The material follows:)

NUMBER AND DEPOSITS OF OPERATING COMMERCIAL BANKS, 1934–1964, BY INSURANCE STATUS[1]

Year	Number		
	Total	Noninsured	Insured
Dec. 31—			
1964	13,775	282	13,493
1963	13,582	291	13,291
1962	13,439	315	13,124
1961	13,444	329	13,115
1960	13,484	358	13,126
1959	13,486	372	13,114
1958	13,540	416	13,124
1957	13,607	442	13,165
1956	13,681	463	13,218
1955	13,757	520	13,237
1954	13,881	558	13,323
1953	14,024	592	13,432
1952	14,086	647	13,439
1951	14,132	677	13,455
1950	14,163	717	13,446
1949	14,198	762	13,436
1948	14,217	798	13,419
1947	14,229	826	13,403
1946	14,218	854	13,359
1945	14,178	876	13,302
1944	14,164	896	13,268
1943	14,202	929	13,273
1942	14,299	952	13,347
1941	14,448	1,018	13,430
1940	14,520	1,078	13,442
1939	14,653	1,115	13,538
1938	15,824	1,163	13,661
1937	15,003	1,205	13,798
1936	15,254	1,281	13,973
1935	15,466	1,339	14,127
1934	15,562	1,414	14,148
Jan. 1—			
1934	14,796	1,792	13,004

[1] Includes stock savings banks and trust companies not regularly engaged in deposit banking. Figures for noninsured banks have been revised and except for recent years supersede those published in earlier Annual Reports of the Federal Deposit Insurance Corporation.

[From annual report of the Federal Deposit Insurance Corporation for the year ended Dec. 31, 1960]

TABLE 17.—*Analysis of changes in number of incorporated commercial banks in Continental United States, 1921–34*

Year	Number at end of preceding year [1]	Net change during period	Began operations			Ceased operations				Other changes—net [6]
			Total	New banks [2]	Reopenings of suspended banks [3]	Total	Absorbed [4]	Suspended [5]	Voluntary liquidations	
Total, 1921-34		−13,963	7,473	4,438	3,035	21,777	6,516	14,267	994	+341
1921	29,206	−188	565	472	93	814	305	461	48	+61
1922	29,018	−198	527	409	118	772	394	343	35	+47
1923	28,820	−424	526	458	68	1,003	329	623	51	+53
1924	28,396	−672	491	383	108	1,191	373	738	80	+28
1925	27,724	−501	484	403	81	1,001	363	579	59	+16
1926	27,223	−943	505	345	160	1,461	462	924	75	+13
1927	26,280	−812	423	296	127	1,260	567	636	57	+25
1928	25,468	−765	305	252	53	1,084	534	479	71	+14
1929	24,703	−1,008	304	235	69	1,321	636	628	57	+9
1930	23,695	−1,818	308	153	155	2,129	769	1,292	68	+3
1931	21,877	−2,728	380	105	275	3,110	798	2,213	99	+2
1932	19,149	−1,571	372	93	279	1,950	433	1,416	101	+7
1933	17,578	−3,226	1,020	323	697	4,302	322	3,891	89	+56
1934 [7]	14,352	+891	1,263	511	752	379	231	44	104	+7

[1] Federal Reserve Bulletin, November 1937, p. 1087. Excludes mutual savings banks and private banks.

[2] Excludes new banks organized to succeed operating banks, but for 1933 and 1934 includes new banks organized to succeed National and State banks unlicensed after the banking holiday.

[3] For 1921–32 includes reopenings accompanied by a change of name and issuance of a new charter. For 1933-34 includes banks closed during the banking holiday in March 1933 which were licensed subsequent to June 30, 1933. Banks licensed between Mar. 15 and June 30, 1933, are not included in this table (either as suspensions or reopenings).

[4] Decrease in number resulting from consolidations, mergers, and absorptions of going banks. Does not include suspended banks that were taken over by other banks.

[5] Includes banks which reopened in the same or a subsequent year.

[6] Chiefly conversions from private banks, but including some unclassified changes, particularly in 1933.

[7] Changes in 1934 include banks that had been closed at the time of the banking holiday and were unlicensed as of Dec. 30, 1933, but were approved for deposit insurance or licensed in time to reopen on Jan. 2, 1934, and other changes between those dates.

TABLE 18.—*Analysis of changes in the number of banks and branches in the United States (Continental United States and other areas), 1934–64*

Year	Total banking offices—net change	Banks							Branches				
		Net change	Began operations		Ceased operations			Other or unclassified changes net	Net change	Opened for business		Discontinued [6]	Other or unclassified changes—net [7]
			New banks [1]	Reopenings of suspended banks [2]	Absorbed [3]	Suspended [4]	Other liquidations			Succeeded absorbed banks	Other new branches [5]		
Total 1934–59	+5,840	−1,359	2,070	1,224	3,177	561	915	------------	+7,199	2,130	6,375	1,385	+79
1934 [8]	+958	+765	130	1,042	212	62	131	−2	+193	75	185	100	+32
1935	+35	−105	97	110	170	32	109	−1	+140	87	138	86	+1
1936	−97	−214	61	22	161	72	65	+1	+117	73	100	56	------------
1937	−136	−253	63	12	177	83	68	------------	+117	90	96	69	------------
1938	−144	−186	44	2	87	80	65	------------	+42	43	51	52	------------
1939	−129	−174	34	9	100	72	45	------------	+45	43	52	50	------------
1940	−98	−133	41	6	78	48	54	------------	+35	41	51	57	------------
1941	−34	−75	48	3	59	16	51	------------	+41	19	59	39	+2
1942	−107	−151	22	2	81	23	71	------------	+44	28	68	52	------------
1943	+90	−97	52	------------	82	5	62	------------	+187	23	212	48	------------
1944	+101	−40	69	1	74	2	34	------------	+141	36	138	33	------------
1945	+40	+13	118	1	77	1	28	------------	+27	40	133	146	------------
1946	+86	+34	144	3	93	2	18	------------	+52	55	171	174	------------
1947	+204	+16	114	2	82	6	12	------------	+188	55	165	31	−1
1948	+192	−13	79	1	77	3	13	------------	+205	59	162	20	+4
1949	+231	−20	78	1	76	9	14	------------	+251	61	201	11	------------
1950	+257	−37	68	------------	89	5	11	------------	+294	73	231	22	+12
1951	+305	−31	65	------------	79	5	12	------------	+336	59	298	24	+3
1952	+293	−46	69	1	99	4	13	------------	+339	84	278	21	−2
1953	+331	−63	65	3	115	5	11	------------	+394	97	323	29	+3
1954	+380	−144	72	1	207	4	6	------------	+524	181	378	37	+2
1955	+516	−124	117	------------	231	5	5	------------	+640	206	483	50	+1
1956	+639	−76	122	1	189	3	7	------------	+715	168	582	39	+4
1957	+592	−79	87	1	161	3	3	------------	+671	145	555	33	+4
1958	+646	−70	96	------------	152	9	5	------------	+716	135	615	37	+3
1959	+689	−56	115	1	169	3	2	+2	+745	154	649	69	+11
1960	+863	−5	125	------------	132	1	4	+7	+868	113	812	60	+3
1961	+897	−40	109	1	138	9	7	+4	+937	126	859	61	+13
1962	+1,027	−8	179	2	183	3	5	+2	+1,035	169	898	51	+19
1963	+1,340	+141	300	------------	154	2	3	------------	+1,199	145	1,098	51	+7
1964	+1,358	+189	336	------------	138	8	3	+2	+1,169	126	1,083	39	−1

[1] Mostly new banks, but includes previously operating financial institutions which became banks of deposit.

[2] Reopenings of or successors to suspended banks, including banks previously in conservatorship, operating under restrictions, or in receivership or liquidation.

[3] Net decrease as a consequence of absorptions, consolidations, and mergers (excluding cases involving financial aid by the Federal Deposit Insurance Corporation).

[4] Banks closed because of financial difficulties, including banks the deposits of which were assumed by other insured banks with the financial assistance of the Federal Deposit Insurance Corporation.

[5] Includes a small number of branches replacing banks relocated or placed in liquidation or receivership, and facilities established in or near military or other Federal Government installations.

[6] Includes facilities discontinued at military or other Federal Government installations.

[7] For 1934, includes branches of banks reopened or previously operating under restrictions.

[8] Changes in 1934 exclude banks approved for insurance or licensed to reopen on Jan. 2, 1934, and other changes between the close of business on Dec. 30, 1933, and the opening of business on Jan. 2, 1934.

If you want to learn about competition, ask what became of the corner grocery store. Year after year, 95 percent of those who went into the grocery business failed.

When I started practicing law in 1908 and didn't have many clients, one of my jobs was to collect accounts from delinquent merchants. I had to take any kind of business that came.

Now, what has become of the corner grocery store? They couldn't compete with A. & P. and Safeway and Kroger. They have just gone out of business.

There is an illustration of competition in industry. And it doesn't apply at all to what we are dealing with.

Senator PROXMIRE. Well, I think that the fact we have had a one-half of 1 percent increase in the number of banks in the last 5 years, when we had an increase in the gross national product that is far greater than that—let's see—the gross national product in 1960 was $500 billion, and now it is $650 billion.

This indicates there was an increase of approximately 30 percent in the GNP and an increase of one-half of 1 percent in the number of banks. I don't think that is necessarily bad. I can understand why this is true. I think the explanation which the Governor has given us is quite logical.

But I think that in the last 30 or 40 years there has been a diminution in the number of banks. And there has been an enormous increase in the economy. Perhaps, as I say, this diminution is justified, but I think the Governor is such an expert witness and such a useful witness for the side which the chairman represents that I think the more questioning we can get this morning the more helpful it will be to the chairman's bill.

I frankly have not made up my mind on the bill. I think it has a lot of merit. But I would like to have the justification of it before I make up my mind.

Senator BENNETT. May the Senator from Utah take advantage of his position to make one or two observations?

Senator PROXMIRE. Yes.

Senator BENNETT. As the gross national product rises, there is an increased demand for availability of larger sources of loans. Banks have lending limits, and there are many situations in which in a given community small banks with small lending limits cannot longer serve the community, and it is better served if a lending agency can be created with larger capacity.

In the City of Salt Lake City, prior to the Bank Merger Act, there was one outstanding bank with very high lending limits, and its competition found themselves unable to compete for the kind of business that was developing in the community. So we had a merger to create another bank which could offer some competition to the giant.

I think the size of banks is very important, and it becomes more important as the economy increases in size. As the volume of individual business rises, its need to find credit with larger limits also rises.

I have another memory of an experience in my own State. These small one-man banks, which have been referred to, find it very difficult—the owner of such a bank finds it very difficult to dispose of his bank when he reaches an age where he no longer wants to operate.

He can't find another man who is willing to go in usually, who is willing to put capital in so small a bank.

I have discovered, in my own State, a tendency that when men come to retirement age, they cannot get their sons or their friends to take the responsibility over and buy them out, and so merger is often the only way by which such a private ownership can be protected.

The Senator talked about the large number of banks 30 years ago. I am old enough to have been connected with a bank when we went through the bank holiday, and I have seen a run on a bank, and I have seen banks in which my family had investments close and not open again because there were too many banks in those days.

And I think we should be interested in preserving the health of the whole system and its ability to serve the needs of the particular communities in terms of size and not to be concerned entirely with just counting heads.

Senator PROXMIRE. May I just say to the Senator, before I yield to the chairman again, that I think there is no question—and that is why there is great wisdom in this legislation—that at times merger can save a bank. It is very important that depositors be protected. That is perhaps more important than anything else. And I think that this is the great strength of this kind of legislation.

At the same time, I think it is proper to explore this a little with the Governor of the Federal Reserve Board to find out just what protection there is going to be for competition if we pass this bill.

The CHAIRMAN. The Chair just wishes to remark that he appreciates very much the knowledge of the Senator from Wisconsin on financial matters and the interest he takes in it. He is a very valuable member of this committee. Nothing would please the chairman more than to have the distinguished Senator from Wisconsin explore all phases of this with what he calls an expert witness.

Because, naturally, when all the evidence is in, the chairman hopes to have endorsement and support of his colleague on this measure.

But just one other word about the gross national product. As the Senator from Wisconsin knows, that is a term that has always given me a lot of concern. One table takes production at factory prices. Another table takes production at retail prices. Another table includes Federal spending. Federal spending I understand is now 18 percent of the gross national product.

When I entered Congress we had a $4 billion budget. Now it is around $100 billion, outside of social security. So the economists claim they can't devise a better term to indicate the industrial growth or lack of growth than the "gross national product."

But I am sure my friend from Wisconsin recognizes it is a rather vague and elastic term, because it includes variables that don't really reflect actual increase in goods and services.

Now, if Government spending can determine gross national product, all we have to do is abolish the independence of the Federal Reserve Board, let Congress print money for whatever we appropriate, and then just pile it up until we get very wealthy.

The Senator from Wisconsin.

Mr. MARTIN. Could I just interject?

Senator PROXMIRE. Yes, indeed.

Mr. MARTIN. The background of this Bank Merger Act from the standpoint of the Federal Reserve was our concern over the fact that

there might be too many bank mergers and acquisitions occurring. It was the Board that took action in 1948 to enforce section 7 of the Clayton Act against the Transamerica Corp., and that was worried about banks absorbed by other banks being operated as branches. The *Old Kent Bank* case in Michigan that got into the Federal courts, indicated the fact that the Board had been deeply concerned that there would be mergers of a predatory nature and mergers that would be directed towards throttling competition rather than mergers that would be beneficial.

This, briefly, was the background from our standpoint of the Bank Merger Act.

Now that we have the act, the problem we wrestle with in each case is that we certainly must consider all the factors involved. We have no desire to make it more difficult for any unit bank that is doing a satisfactory job in the community. But we also don't want to have the sort of situation that develops when an approval is given in a regulated industry and then to have a long period of protracted litigation and unscramble the assets.

I think that this *Manufacturers Hanover* case is a pretty good example of it. From 1961 to 1965 is a pretty long period of time, and then to unscramble what happened in the intervening period is a very serious problem.

Senator PROXMIRE. You see, there was a lot of concern on the part of some of us when some of the biggest banks in the country merged, and it was hard for me to understand, from my very limited experience in banking, why this was necessary.

I know this took place before the Bank Merger Act when you didn't have the authority to step in and do anything about it.

But there was a merger, for example, of the Chase and the Manhattan, two big banks and two banks that became more powerful. And while they might be able to compete more effectively maybe with the Bank of America, with which they didn't compete very much anyway, that was hard to understand.

But there was First National Bank with the National City Bank in New York. That was another example of two very large institutions merging. When both seemed to be able to offer every service to any borrower or any depositor, virtually any, it seemed hard to understand how you could justify that.

Now, those took place before you were responsible. But this was the kind of thing that prompted me to wonder whether this would be adequate to give this kind of proposed merger really effective review in the future and to reject it in the event it doesn't seem to be justified.

Certainly, in those cases, these banks seemed to have everything that was needed to protect the depositor, and the merger perhaps was more profitable for both, for the stockholders, but it would hardly be justified on other grounds.

Would the clerk read back to me the question I asked the Governor at the time I yielded first to the chairman of the committee?

Mr. MARTIN. I would like to put in the record, if I may, the letter the Board wrote to Chairman Celler on October 12, 1950. The letter points up the Board's concern regarding the inadequacy of the merger law before 1960. The concluding two paragraphs of that letter are interesting, I think, in this connection.

We say here:

This fact would seem to be of interest because it calls attention to a weakness in section 7 of the Clayton Act, a provision for which this Board has responsibility for enforcing compliance where applicable to banks. As you know, section 7 in effect forbids one corporation to acquire the capital stock of another corporation engaged in commerce if the effect may be to lessen competition or tend to create a monopoly. However, the section does not apply to the acquisition of assets.

H.R. 2734 which passed the House of Representatives on August 15, 1949, and is now pending in the Senate, would broaden section 7 of the Clayton Act so that it would also apply to acquisitions of assets—but only in the case of corporations that are subject to the jurisdiction of the Federal Trade Commission. It is understood that, with the exception of this Board, all the other agencies having responsibility for enforcing compliance with section 7 of the Clayton Act already have general authority, under other provisions of law, over acquisitions of assets in the case of persons for whom they have enforcement responsibility in connection with section 7. However, even with the enactment of H.R. 2734, section 7 would continue to be confined to acquisitions of capital stock insofar as banks are concerned.

(The complete letter follows:)

Board of Governors of the
Federal Reserve System,
Washington, D.C., October 12, 1950.

Hon. Emanuel Celler,
Chairman, Subcommittee on Study of Monopoly Power, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Mr. Chairman: The proposed merger of the Brooklyn Trust Co. with the Manufacturers Trust Co. of New York, to which you refer in your letter of September 20, 1950, was considered by the Board of Governors in connection with the provisions of section 12B(v)(4) of the Federal Reserve Act, as amended, which has since become section 18(c) of the Federal Deposit Insurance Act. That section provides, in part, that:

"No insured bank shall (i) merge or consolidate with an insured State bank under the charter of a State bank or (ii) assume liability to pay any deposits made in another insured bank, if the capital stock or surplus of the resulting or assuming bank will be less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or of all parties to the assumption of liabilities, at the time of the shareholders' meetings which authorized the merger or consolidation or at the time of the assumption of liabilities, * * * unless the Board of Governors of the Federal Reserve System gives prior written consent if the assuming or resulting bank is to be a State member bank * * *"

The Manufacturers Trust Co. now has capital $45 million and surplus $60 million and the Brooklyn Trust Co. has capital $8,200,000 and surplus $6 million. The merger is to be effected under the name of the Manufacturers Trust Co. and the continuing institution is to have $50,390,000 capital and $69,440,000 surplus. Therefore, the capital stock of the continuing institution will be less than the aggregate capital stock of the merging banks, although its surplus will be greater than the aggregate surplus of the merging banks and its combined capital and surplus will exceed the present aggregate capital and surplus of the merging banks. In the circumstances, the written consent of the Board of Governors was requested and it was granted August 31, 1950.

The increase in capital stock of the Manufacturers Trust Co. is to be effected through a stock dividend of $3,750,000 to be paid to holders of record prior to the merger (187,500 shares, par $20) and the issuance of 82,000 shares ($1,640,000 par value) to be exchanged for stock of the Brooklyn Trust Co. Each of the 82,000 shares of Brooklyn Trust Co. stock outstanding is to be surrendered for cancellation in return for $183 in cash and one share of Manufacturers Trust Co. stock. The management of Manufacturers Trust Co. chose to request the written consent of the Board of Governors to merge as proposed rather than further increase capital stock by $2,810,000 par value. Had capital stock been so increased the consent of the Board of Governors would not have been required.

Although the specific question which the Board was required to consider under section 12B(v)(4) of the Federal Reserve Act (now sec. 18(c) of the Federal Deposit Insurance Act) was whether the merger should be permitted without an increase in the capital stock of Manufacturers Trust Co. to an amount equal to the combined capital of that institution and Brooklyn Trust Co. prior to the

merger, consideration also was given to collateral matters and implications, including the effect of the proposed transaction upon the Manufacturers Trust Co. and upon the competitive situation.

There appeared to be no reason to object to the proposed merger from the standpoint of asset condition, adequacy of capital, and competency of management. According to statements submitted as of June 30, 1950, the Manufacturers Trust Co. had total resources of $2,271,800,000 and the Brooklyn Trust Co. $244,070,000. The total resources of the resulting institution would be large but not proportionately much larger that the present principal unit and not disproportionate as compared with other institutions with which it would compete in the Borough of Manhattan and the Borough of Brooklyn. It did not appear that the proposed transaction would tend to create a monopoly.

Polk's Bankers Directory for March 1950 (latest available, although there have been a few changes since it was issued) shows 3 National banks and 27 State chartered banks and trust companies, other than the Brooklyn Trust Co., having their head offices in the Borough of Brooklyn and operating 38 branches most, but not all, of which are located in Brooklyn. The total resources of these banks amounted to $3,725,085,000 of which the bulk ($3,511,526,000) was represented by 21 savings banks. In addition, the Borough of Brooklyn was served by 70 branches of banks and trust companies having head offices in the Borough of Manhattan, including 21 branches maintained by the Manufacturers Trust Co. The banks having head offices in Manhattan and operating branches in Brooklyn were 13 in number and included some of the city's largest, such as the National City Bank with 16 branches in Brooklyn.

Although this transaction did not appear to be one which would tend to create a monopoly, it seems desirable to mention again that the Board's authority in the matter existed only because of the fact that the management of the Manufacturers Trust Co. preferred to seek the Board's consent rather than issue additional capital stock. As indicated above, the Board's consent was required here under section 12B(v)(4) of the Federal Reserve Act (now sec. 18(c) of the Federal Deposit Insurance Act) only because of the fact that, although the capital and surplus of Manufacturers Trust Co. after the merger will be larger than the capital and surplus of that institution and Brooklyn Trust Co. before the merger, the capital of Manufacturers Trust Co. after the merger will be somewhat smaller than the capital of the two institutions before the merger. In other words, the Board would have no authority in the matter except for that difference in capital.

This fact would seem to be of interest because it calls attention to a weakness in section 7 of the Clayton Act, a provision for which this Board has responsibility for enforcing compliance where applicable to banks. As you know, section 7 in effect forbids one corporation to acquire the capital stock of another corporation engaged in commerce if the effect may be to lessen competition or tend to create a monopoly. However, the section does not apply to the acquisition of assets.

H.R. 2734 which passed the House of Representatives on August 15, 1949, and is now pending in the Senate, would broaden section 7 of the Clayton Act so that it would also apply to acquisitions of assets—but only in the case of corporations that are subject to the jurisdiction of the Federal Trade Commission. It is understood that, with the exception of this Board, all the other agencies having responsibility for enforcing compliance with section 7 of the Clayton Act already have general authority, under other provisions of law, over acquisitions of assets in the case of persons for whom they have enforcement responsibility in connection with section 7. However, even with the enactment of H.R. 2734, section 7 would continue to be confined to acquisitions of capital stock insofar as banks are concerned.

Very truly yours,

S. R. CARPENTER, *Secretary.*

Mr. MARTIN. Now, Mr. Shay here was with the Board when this letter was written. He might like to comment on that.

Jerry?

Mr. SHAY. The Bank Merger Act of 1960, of course, amended section 18(c) of the Federal Deposit Insurance Act prior to the 1960 amendment. The Board had direct authority to approve to disapprove mergers where the resulting bank was a State member bank only if the capital or surplus of the resulting bank—the bank resulting from the merger—was less than the combined capital or surplus of the participating institutions.

So, as a practical matter, banks under the pre-1960 law had it within their power, through adjustments of increases of capital funds, to avoid coming to the Board for approval.

And it is interesting to note, just to elaborate a little bit here, that through the Board's authority to pass on branches of State member banks, it tried to consider the competitive aspects of these things and look at the merger not from the standpoint of the merger, as such, where we wouldn't be able to under the merger law, but rather from the standpoint of passing on the branch application. Because so often the absorbed bank is operated, as you know, as a branch of the resulting bank.

And we were challenged in that, and the district court told us in the *Old Kent* that we couldn't do it. That was an effort, a strong effort we made before the Bank Merger Act was passed.

Mr. MARTIN. We had the *Transamerica* case and this *Old Kent* case that I mentioned.

Senator PROXMIRE. Would the clerk read my last question?

(Question by Senator Proxmire read as follows:)

But I am still concerned about a situation that finds so many cases where one bank has such a very large proportion of all the banking assets in the community, and I wonder, in the light of this, if the Congress can't adopt some amendment perhaps to this bank merger bill, which I think has a lot of justification.

Senator PROXMIRE. That was the question I asked. I think, Mr. Martin, you haven't had a chance to answer it.

I say I am still concerned about the kind of situation that has occurred where one bank has nearly half the assets, half the banking assets, in the community. And I am wondering if any further guidelines would be desirable or necessary or if this should be left completely up to the discretion of these three agencies.

Mr. MARTIN. It is very difficult to write that sort of guideline. And this is the problem of a specialized field. If banking is like chainstores, for example, I think that is one thing. But if banking really warrants having specialized supervision, such as we have in the Federal Reserve Board, the FDIC, and the Comptroller's Office, it seems to me that you have got to grant some authority to them to make a determination of this thing with respect to the public interest.

How you would write a safeguard into the law as to what given size would be desirable is a matter—well, Morris Ernst, a great many years ago, wrote a book called "Too Big" that I have struggled with a long time, and I don't know what "too big" is. I don't think any of us do.

Senator PROXMIRE. Now, one of the indications which has concerned me, suggesting that perhaps the competition of the banks has not been adequate, is the phenomenal growth of other institutions. Savings and loans and small loan agencies, and so forth, have grown at an immense rate. Many people feel they have encroached on banking, and some bankers feel that they represent a kind of an unfair competition because they are not subject to the same regulations.

Mr. MARTIN. Right.

Senator PROXMIRE. I think there is a lot of merit to that position. I am wondering if maybe one of the reasons is they are moving into an economic vacuum or an economic opportunity which the banks, themselves, have permitted by not being sufficiently aggressive and competitive in the past.

Mr. MARTIN. There has been some of that. And then there have been tax considerations and different regulations, for example, as you pointed out.

But, unquestionably, there has been an overlapping of some of these things. I think the banks did let a lot of this business get away from them that they might have done.

Senator PROXMIRE. Another indication that has concerned me as chairman of the Small Business Subcommittee of this committee is that it is hard to really understand the necessity for having a Small Business Administration in a nation as rich as this is with the enormous resources we have and the great concentrations everywhere throughout the country of investments.

It seems to me if this Nation were adequately banked that there would not be the clamor that all of us as Members of the Congress get from our constituents who feel they cannot get loans and that they have got to go to the Government to get some kind of subsidized assistance from the SBA.

Isn't this an indication of the failure of banks to provide sufficient services?

I realize that there are some functions of the SBA which are outside this—disaster assistance and so on.

Mr. MARTIN. You are always going to have trouble when it comes to judgment of credit risk, you see. It is a very difficult area, because one group thinks that they are entitled to credit, and frequently it is a matter of judgment as to whether they are or not, whether it is wise for them to receive the credit.

But, on the whole, I think the banking community has done a fairly good job in serving these needs.

Now, the fact that there is a Small Business Administration—we are always trying to find some means of improving the economy. But I don't think it is necessarily a reflection on the banking community.

Senator PROXMIRE. The argument we sometimes get on this committee from those who come before us is that some areas of the country are underbanked. Others have adequate banking. Where you have adequate banking, the case for the SBA providing additional services is pretty feeble. But they say there are areas of the country that don't provide this service.

Do you feel that this may be true—that there are parts of the country that are less adequately banked than others?

Mr. MARTIN. Yes, I think there are parts of the country less adequately banked than others. But I am not just sure what you do about them. It depends upon the community to generate interest and leadership in providing the service.

Senator PROXMIRE. Perhaps this legislation may have adequate merit to pass it and perhaps we ought to concentrate on other elements that have inhibited banks from being established. After all, there is plenty of initiative in this country, and we have, as I have said over and over again, plenty of money. People would like to be bankers.

What keeps us from developing more banks than we have? The tax situation? Is the regulation too tight?

Mr. MARTIN. Well, I think that there are regulations, as you know——

Senator PROXMIRE. Is entry too difficult?

Mr. MARTIN. But I think where people have a real need for banking services there has been, as a rule, a group that will develop very quickly that will want to organize a bank and get a charter and provide banking services. That has been the history of banking in this country.

I remember in St. Louis, as a boy, that one of my early recollections is of an older man who was denied credit at one bank and so he decided he would start his own bank. And he went out and built one of the good banks in town.

Senator PROXMIRE. It seems to me I recall that until last year or the year before there had been no new bank in the city of Washington since 1911. Now, that may be incorrect. But it is symptomatic of the fact that in the last 50 years we have had this great growth of this city, just for example, and no corresponding increase in banking facilities and therefore a deterioration in the competitive situation.

Again, this is not central to this particular bill, because I am talking about entry rather than the mergers.

Mr. MARTIN. But again this matter of competition on this has to relate to the services that are required. You take in New York now, for example, you have the First National City Bank and the Chase Manhattan Bank in a class by themselves as far as overall services are concerned. Are they to be kept for all time in this position because they do have services that they render to a broad community?

This is part of it.

Senator PROXMIRE. Let me get into another area now, the advisory report of the Attorney General. What does this amount to? The Attorney General advises you on the merger?

Mr. MARTIN. Under the Bank Merger Act, he is to advise only on the competitive aspects of the merger. All of our advisory reports are only on the——

Senator PROXMIRE. This is a report that is due in 30 days you say?

Mr. MARTIN. In 30 days normally, yes.

Senator PROXMIRE. I know that in this area nothing is typical, but say you have a merger in a city of half a million or a million and it is of two substantial banks. How comprehensive and searching would be the study made by the Attorney General?

Would they normally have one man who would work on it for a couple of days, or would they send out a staff and make a pretty substantial study and recommendation?

Mr. MARTIN. I really don't know everything that the Department of Justice does in preparing its reports. You would have to ask them. The reports that we get——

Senator PROXMIRE. You have been getting these reports, haven't you?

Mr. MARTIN. Oh, yes. We get the report, yes, and the report is usually reasonably extensive, and it usually ends with some such a comment as, "This will diminish competition," or, "This would be slightly adverse to competition," or, "This is adverse to competition."

Senator PROXMIRE. Just the phrase? Do you get it backed up with——

Mr. MARTIN. Yes. We could give you copies.

Senator PROXMIRE. The categories are what again? The categories are little effect on competition——

Mr. MARTIN. I just say those are examples of the way I read them. I do not read them as specific categories and I did not mean to suggest that there are specific categories. Different people may not read them the same way. But sometimes the reports say that the effect will be adverse to competition. Sometimes that it will be slightly adverse. Sometimes they say it is hardly adverse at all.

Senator PROXMIRE. If the Attorney General indicates that the effect is in the strongest area, under those circumstances would you ever approve the merger?

Mr. MARTIN. Yes. The legislative history, as I pointed out, anticipates such a situation.

Senator PROXMIRE. You would anyway, even though this diminished the competition seriously?

Mr. MARTIN. Well, we would make our own assessment of competition in the light of all of the factors, as required by the statute. We must weigh all the factors. We would also take the advisory views of the FDIC and the Comptroller into account, and the three advisory reports we get on each case frequently don't agree.

Senator PROXMIRE. I thought you had the exclusive jurisdiction over State member banks.

Mr. MARTIN. That is right.

Senator PROXMIRE. Well, then, you would not get advice from the Comptroller? You would anyway?

Mr. MARTIN. Oh, yes. The statute requires it.

Senator PROXMIRE. In all these cases all three of you act?

Mr. MARTIN. Oh, yes. We would decide the case, but we would have three advisory reports limited to competition.

Senator PROXMIRE. But one agency is controlling. And under this bill, under the Robertson bill, you would still all three act?

Mr. MARTIN. Still.

Senator PROXMIRE. You would continue to get advice?

Mr. MARTIN. Yes, on the competitive effects only.

Senator PROXMIRE. You would make your decision. Even if the Attorney General said this would put this in the strongest category as far as reducing competition is concerned, you would still approve it under some circumstances?

Mr. MARTIN. Oh, yes. Yes indeed. We might. But we would certainly go slow on it as, in such a case, there might not be other factors outweighing or offsetting the competitive factor. We certainly study these reports and weigh all the factors.

Senator PROXMIRE. You would not consider the Attorney General's determination of the effect on the competitive situation as definitive? You would simply take it as advisory and proceed on the basis of your own judgment?

Mr. MARTIN. That is correct.

Senator PROXMIRE. Even though the Attorney General is expert in these matters and has the experience and so forth?

Mr. MARTIN. Well, we might think that the other factors outweigh, and under the statute we must consider them all.

Senator PROXMIRE. Yes. I am talking about competition alone. You would still evaluate—you would go beyond his categorization and decide yourself whether you really think the effect on competition would be as serious as he says?

Mr. MARTIN. Yes indeed. We would indeed. Because we are supposed to be specialists on matters affecting banks, and under the Bank Merger Act we would have to make our own judgment on the application, taking into account his advisory report on the competitive factors.

Senator PROXMIRE. Would you regard it as very damaging if this were amended to provide that where the Attorney General indicates that it would be in the strongest category and have the worst effect on competition that this would prohibit the merger? Would you feel that that would be very bad legislation?

Mr. MARTIN. Well, yes, I think it would, because I don't see—then, it seems to me, you are making the Attorney General the bank supervisory agency.

Senator PROXMIRE. Only in the instance where he finds that the effect on competition would be most drastic.

Mr. MARTIN. Well, but he ought to review all aspects of the cases then. He ought to be set up then to do exactly what we do. He ought to be having a division over there that does nothing but work on banking.

Senator PROXMIRE. Do you find the Attorney General is adequately staffed to do this job?

Mr. MARTIN. Well, I am not competent to judge on that. We have had very good relations with the Attorney General during the time I have been with the board. Our relations have been good with him.

Senator PROXMIRE. You make your own separate finding and investigation on competition? You don't simply rely on the Attorney General?

Mr. MARTIN. That is right.

Senator PROXMIRE. Let me just ask some questions in one other area. I find that, as I said, you approved 142 applications to merge since this act was passed, and you have denied 17. I know these batting averages mean nothing. But you have the best batting average of the three agencies, better than the Comptroller General and better than FDIC. FDIC had 172 approvals and denied only 2. The Comptroller of the Currency had 450 approvals and denied only 12.

Now, the only way that I can get at any meaning of this, it seems to me, is to ask you if you can explain to us the case of the biggest merger that you have had before you of these 142 which you approved and then give us one example of a case which you did not approve and why—the effect on competition.

Mr. MARTIN. The biggest merger we have approved——

Senator DOUGLAS. Would you speak more loudly, Mr. Chairman?

Mr. MARTIN. Sorry, Senator. The biggest merger we have approved is the Manufacturers Hanover Trust, which is the one decided by the Federal District Court in New York that we referred to earlier.

Senator PROXMIRE. In which the Attorney General is trying to upset it?

Mr. MARTIN. That is correct. We approved that in 1961, and that was overturned in March of 1965—this year.

Late last year one of the cases that we turned down was the Camden Trust and Merchantville Bank application. Can you give the details on that, Jerry? I do not recall the case too well.

Mr. SHAY. I think Mr. Leavitt might recall more details of it.

Mr. LEAVITT. Yes. Late last year the Board denied an application of the Camden Trust Co. in New Jersey.

Senator DOUGLAS. Would you speak louder, please?

Mr. LEAVITT. Last last year the Board denied an application by Camden Trust Co. to merge with a bank in Merchantville, which is near the area where Camden Trust Co. operates. This was denied essentially on competitive grounds.

The Department of Justice rendered a very adverse competitive factor advisory report in that case. The Board also felt that the competitive situation was adverse. It was denied on these grounds, and, of course, after due and careful consideration of all other factors, the so-called banking factors.

Senator PROXMIRE. Now, in the case of Manufacturers—and what was the other bank?

Mr. MARTIN. The Hanover Trust.

Senator PROXMIRE. These are two banks which by Wisconsin standards—which I realize are not appropriate in New York—are enormous institutions.

Mr. MARTIN. That is correct.

Senator PROXMIRE. They seem to be able to provide complete and total protection in each case to their depositors. They are very sound in the sense of being adequately capitalized and certainly amply big for most banking services.

I take it that you felt that competition might have been increased, inasmuch as the combined bank might offer services which Chase Manhattan and National City do and no other bank in New York City does? Is that correct?

Mr. MARTIN. I can only speak for one member of the Board on this. But I came to the conclusion—and I studied that case very hard—that they were not——

Senator PROXMIRE. Speak a little bit louder.

Mr. MARTIN (continuing). That it was not going to be detrimental to other banks in the community, this merger, and it would give increased competition and increased service in the area that the Chase Manhattan and the First National City now had a virtual monopoly in as I saw it. After considering all aspects of it, I thought that this merger would be in the public interest.

Senator PROXMIRE. And you denied the application to merge in the *Camden* case primarily on competitive grounds?

Mr. MARTIN. Primarily competitive grounds.

Senator PROXMIRE. Most of these denials are on competitive grounds?

Mr. MARTIN. Yes. Yes, practically all of them are on competitive grounds. Sometimes other matters enter into it—we find the bank not in a position—capitalization or convenience and needs of the community, but most of the time it is the competitive factor.

Senator PROXMIRE. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. The chairman would just like to remind the members of the committee, with respect to the biggest merger that you approved, that there were two other banks in New York bigger than the Manufacturers Hanover after it was merged. The other two had previously been merged. The other two would be subject to prosecution under the present law.

And, as I recall, the total banking assets of New York City are in the neighborhood of $50 billion. Do you know offhand if that is about correct?

Mr. MARTIN. That is about it, Senator.

The CHAIRMAN. All right. Now, there is a right good sized bank in the historic and wonderful city of Chicago called Continental Illinois. It merged with a very small bank.

Senator DOUGLAS. Rather, the smaller bank merged with the Continental.

The CHAIRMAN. One way or the other. It still is not as large as the First National in New York. You have 80 banks in Chicago. You have over $14 billion of banking resources in Chicago. Although in population Chicago is about a third as big as New York City, it is the grain market of the world. But New York City is the money market. Yet they have proceeded against Continental Illinois. That is in court now.

Now, I think it would be helpful if this committee will just recall a little history of bank mergers. Senator Fulbright attempted a bank merger bill. That did not get completed. Senator Kefauver and Mr. Celler attempted one. That did not get completed. But the bill I introduced in 1959 did get completed.

Congressman Celler testified over here that he wanted the Justice Department given more authority under the bill. He said they were not given enough authority and that they ought to be given more. Senator O'Mahoney offered that amendment. The distinguished Senator from Wisconsin supported the O'Mahoney amendment as I recall. Anyway, that was not adopted. Then the bill passed the Senate unanimously.

It went over to the House. There was a suggestion that, while all of the things in the Senate bill that must be taken into consideration were good and desirable, the Senate language—that the appropriate Federal bank supervising agency should, after considering those factors, approve a merger if it didn't lessen competition unduly—was not strong enough, and so the House substituted that the merger should be approved if the final conclusion was, after consideration of these seven different factors, that the merger was in the public interest.

Well, what was the vote in committee on that bill? It was unanimous.

What was the vote in the House on that bill? It was unanimous.

What did Congressman Celler say about that bill? He said: "I'd rather have had the kind of amendment that I have been recommending, but this is better than nothing. I will vote for it." He did not even offer his amendment in the House.

I would like to put in the record the statement of Mr. Spence in which he says that the bill makes it clear that this determination is under the exclusive control of the regulatory agencies and that the House committee was unanimous on that.

Of course, it is the privilege of any Member of Congress to change his mind any time on anything, but I am giving you the history of this bill.

(The statements of Mr. Spence and the other Members of the House in support of the bill referred to appear at p. 295.)

The CHAIRMAN. Then when we had the first decision, I made another speech in the Senate. And I ask permission to put it all in, but here is what I bring to your attention:

Five distinguished representatives of the Justice Department—Attorney General Brownell in 1957, Deputy Attorney General Walsh in 1959, and three heads of the Antitrust Division: Judge Barnes in 1956, Judge Hanson in 1957, and Hon. Robert A. Bicks in 1960—recommended the enactment of a Bank Merger Act. They recommended that such an act should apply the principle of section 7 to bank mergers. All of them based their recommendations on their understanding that section 7 did not apply.

And that is what we thought. We made it crystal clear. I said that is what it did. The majority leader, Mr. Johnson, said that is what it did. The chairman of the House committee said that is what it did. Everybody voted for it.

(The full text of the statement above referred to along with other discussions from the Congressional Record follow:)

[From the Congressional Record, June 19, 1963]

THE PHILADELPHIA BANK MERGER CASE

Mr. ROBERTSON. Mr. President, I was shocked to hear of the Supreme Court's decision in the Philadelphia bank merger case. This is one of the most incredible cases of judicial legislation which the Court has handed down.

I was shocked both at the result and at the Court's casual disregard for congressional intent and purpose.

The case holds that section 7 of the Clayton Act applies to bank mergers. Before 1950, section 7 of the Clayton Act applied only to stock acquisitions, where one corporation bought and held stock of another company. In 1950, by the Celler-Kefauver Act, an additional prohibition was added—a prohibition against asset acquisitions by corporations subject to the jurisdiction of the Federal Trade Commission. Banks were not and are not subject to the jurisdiction of the FTC, but to the jurisdiction of the Federal Reserve Board.

Neither the original section 7 nor the Celler-Kefauver amendment applied to bank mergers carried out under the merger provisions of the National Bank Act. But somehow the Supreme Court, or at least five judges, reach the conclusion that the amended act applies to such bank mergers.

This interpretation is an original and novel idea. Congressman Celler did not think he had accomplished this result. The distinguished chairman of the House Judiciary Committee appeared before the Senate Banking and Currency Committee in 1959 and testified as follows:

"Section 7 was designed to stop mergers beyond the reach of the Sherman Act but its failure to include mergers accomplished by asset acquisitions resulted in a loophole which so far as nonbanking corporations are concerned was closed by passage of the Celler-Kefauver Act of 1950. Moreover, because of revisions made in subsequent versions of various antimerger bills, it became impracticable to include within the scope of the Celler-Kefauver Act corporations other than those subject to the jurisdiction of the Federal Trade Commission. This left asset acquisitions by banks unaffected by the new law since authority to enforce the provisions of section 7 dealing with banks is vested in the Federal Reserve Board and not in the Federal Trade Commission.

"Beyond this, virtually all bank mergers are accomplished by asset acquisitions by virtue not only of provisions of Federal laws prohibiting member banks of the Federal Reserve System, with a few exceptions, from purchasing corporate stocks, but also of various State statutes prescribing similar limitations. For these reasons, section 7 of the Clayton Act has little value in coping with the mounting trend of bank merger activity.

"To close this loophole in section 7 and provide Federal enforcement agencies with the same authority to move against bank mergers accomplished by asset acquisitions, I introduced H.R. 5948 in the 84th Congress. This bill was adopted by the House without dissent on February 6, 1956, but was not brought up on the Senate floor for vote. I might add that the measure was in accordance with the President's recommendations submitted to the Congress in 1956 and repeated in 1957, 1958, and 1959, calling for revision of antitrust legislation to cover the bank mergers accomplished by asset acquisitions."

Five distinguished representatives of the Justice Department—Attorney General Brownell in 1957, Deputy Attorney General Walsh in 1959, and three heads of the Antitrust Division—Judge Barnes in 1956, Judge Hanson in 1957, and Hon. Robert A. Bicks in 1960—recommended enactment of a bank merger act. They recommended that such an act should apply the principles of section 7 to bank mergers. All of them based their recommendations on their understanding that section 7 did not apply to bank mergers.

The Senate Banking and Currency Committee and the Senate, in considering the bill which finally became the Bank Merger Act, clearly and repeatedly stated their understanding that section 7 did not apply to bank mergers and clearly and repeatedly decided not to apply section 7 to bank mergers.

In the face of this background, the majority of the Supreme Court, as far as I can grasp their reasoning, simply say the Celler-Kefauver Act of 1950 was intended to prohibit mergers. Bank mergers are mergers. Therefore, the Celler-Kefauver Act applies to bank mergers.

This is false logic. Anyone with legislative experience knows that what a statute does not cover is as important as what it does cover. The limits on a statute's scope are vitally important in getting legislation through Congress. Legislative bodies deal with specific problems and issues, and the statutes they enact should be limited to what the statutes cover—not extended endlessly at the whim of the Court.

The Court often quotes Chief Justice Marshall, "It is a Constitution we are expounding," when it is stretching constitutional provisions. Whether we agree or not with these judicial amendments to the Constitution, we are by now well used to them. But the reverse is equally true. Statutes should not be expounded with the same freedom the Court applies to constitutional provisions.

The Court, I am glad to say, does not always rewrite statutes. When it wishes, the Court adopts the policy of following the terms of a statute and the clear will of Congress, leaving it to Congress to amend the act. A leading case along this line is *Toolson* v. *New York Yankees*, 346 U.S. 356.

I am also glad to say that Mr. Justice Harlan and Mr. Justice Stewart dissented in a clear and compelling opinion written by Justice Harlan. Mr. Justice Harlan made it entirely clear that: "For 10 years everyone—the department responsible for antitrust law enforcement, the banking industry, the Congress, and the bar—proceeded on the assumption that the 1950 amendment of the Clayton Act did not affect bank mergers. This assumption provided a major impetus to the enactment of remedial legislation, and Congress, when it finally settled on what it thought was the solution to the problem at hand, emphatically rejected the remedy now brought to life by the Court."

He pointed out that: "The legislative history of the 1950 amendment also unquestionably negates any inference that Congress intended to reach bank mergers."

Mr. Justice Harlan continued by pointing out: "The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy."

It is too early to tell just what this decision means. At the least, it means that the Justice Department has the controlling voice in bank mergers, instead of the advisory role the Congress intended when it passed the Bank Merger Act. This decision may mean that there will be no more bank mergers. It certainly means there will be none unless the Justice Department agrees. It is not clear how far this decision will be applied to past mergers—how far the Department of Justice may go in seeking to upset mergers which have been effected since the 1950 amendment to section 7.

[From the Congressional Record, Mar. 25, 1965]

Banking Versus the Antitrust Laws

Mr. Robertson. Mr. President, I ask unanimous consent to have printed in the Record an editorial from the Miami Herald of March 16 entitled "Unscramble a $7 Billion Omelet."

Mr. President, this editorial refers to the decision of the U.S. District Court for the Southern District of New York in the *Manufacturers Hanover Trust Co.* case decided on March 11, 1965. This opinion was the outgrowth of two decisions by the Supreme Court; *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321 (1962) and *U.S.* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964). In the *Philadelphia* and *Lexington* cases the Supreme Court, for the first time in its history, held that bank mergers were subject to section 7 of the Clayton Act

and section 1 of the Sherman Act. The *Philadelphia* case held that the proposed merger would violate both section 7 of the Clayton Act and the Sherman Act. The *Lexington* case held that the merger there violated the Sherman Act. The *Manufacturers Hanover Trust Co.* case held that its merger violated section 1 of the Sherman Act and section 7 of the Clayton Act.

These decisions were reached although the responsible Government agencies which considered the applications for mergers had held, after considering all the factors involved including both banking factors and competitive factors, that the mergers were affirmatively in the public interest. In addition, in the *New York* case the New York State banking superintendent of banks had also approved the merger.

I said at the time the *Philadelphia* decision was announced that it was "one of the most incredible cases of judicial legislation which the Court has handed down." I also said that I was shocked both at the result and the Court's casual disregard for congressional intent and purpose. I pointed out that Congressman Celler, the chairman of the House Judiciary Committee, had testified in favor of the Bank Merger Act, though with stronger provisions, because bank mergers were not covered by section 7 of the Clayton Act. Five representatives from the Justice Department also testified to this fact—Attorney General Brownell in 1957, Deputy Attorney General Walsh in 1959, Judge Barnes in 1956, Judge Hanson in 1957, and the Honorable Robert A. Bicks in 1960. In addition, Congressman Celler induced the House to pass an amendment to section 7 of the Clayton Act which would have made it apply to bank mergers, but this failed in the Senate. Finally, an amendment was proposed by Senator O'Mahoney to the Bank Merger Act in 1959 which would have imposed the stricter standards of the Clayton Act, but this was defeated by a vote of 29 yeas and 55 nays. In its report the committee intended to leave no doubt that section 7 of the Clayton Act should not apply. It said:

"Since there was widespread agreement that some mergers were in the public interest and should be approved, even though they might result in a substantial lessening of competition, the committee concluded that the strict rule of the 1950 amendment of section 7 of the Clayton Act was inappropriate to the field of banking * * *.

"The committee, therefore, concluded that it was preferable to handle bank mergers under rules specially designed for the banking industry."

The decision in the *Philadelphia* case was entirely unexpected. Mr. Justice Harlan condemned it by saying: "I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court."

He went on: "The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy.

"This frustration of a manifest congressional design is, in my view, a most unwarranted intrusion upon the legislative domain."

In the *Lexington* case, Mr. Justice Harlan's dissent criticized the application of the Sherman Act—made necessary because the Government had not thought that the Clayton Act would apply when it filed its complaint—on the ground that, "The truth is, of course, that this is, if anything, a Clayton Act case masquerading in the garb of the Sherman Act."

At the time of the *Philadelphia* decision I said that it was too early to tell just what the decision means. It now seems clear that at least it will mean an effort by the Department of Justice and the courts, carried out with the threat of contempt fines and the appointment of masters in chicanery, to split the merged bank into two different banks. What with the changes that have gone on and the growth that has occurred since the merger, they will clearly not be the same two banks they were originally. How the depositors, borrowers, and other customers, and how the officers, employees, and stockholders will feel toward these new banks we do not know. I think we are now beginning, however, to see the unfortunate results of ill-considered efforts by the Supreme Court to supersede the Congress as the legislative body of the United States.

The editorial from the Miami Herald is a clear and convincing picture of the dangers that lie before us in this field.

I also ask to have printed in the Record at this point a letter from the Honorable K. A. Randall, Director of FDIC, in which he endorses the views of Mr. Justice Harland concerning the meaning and effect of the Bank Merger Act and its construction by the courts.

There being no objection, the editorial and letter were ordered to be printed in the Record, as follows:

[From the Miami (Fla.) Herald, Mar. 16, 1965]

"UNSCRAMBLE A $7 BILLION OMELET?

"A slight rush of bank mergers around the country in 1961 has been followed by Justice Department action to undo what many thought logical and lawful at the time.

"The most spectacular of these antitrust suits involves Manufacturers Hanover Trust Co. of New York, a $7 billion institution. Whether the Federal Government is right or wrong, the timing of the matter gives pause. How do you unscramble these eggs after 4 years?

"Under a Federal court ruling which warned of 'a clear and imminent threat that a handful of banks are likely to sew the market up tight,' the New York concern must be returned to the two-bank status which obtained in 1961.

"No more intricate and costly divestiture could be imagined.

"A bank is essentially a service industry. If it is sizable, it is involved every day in thousands of transactions embracing tens of thousands of persons in one manner or another. Manufacturers Hanover, for example, has 136 branches throughout New York City. The task of pulling all of this apart and making two out of one would be staggering.

"Even more disturbing is the strange history of the *New York* case.

"When Manufacturers and Hanover came together in 1961 the merger had the explicit blessing of the Federal Reserve Board. The Antitrust Division of the Justice Department waited until the day of the actual merger, which took many months to arrange, before it attacked what one arm of Government already had applauded and which the court has acknowledged is desirable though illegal.

"If the law is pursued relentlessly in an industry which has known many mergers over the years the result could be banking chaos."

"FEDERAL DEPOSIT,
"INSURANCE CORPORATION,
"*Washington, March 25, 1965.*

"Hon. A. WILLIS ROBERTSON,
"*U.S. Senate, Washington, D.C.*

"MY DEAR SENATOR: This note is for your information following my discussions with your chief of staff, Mr. Matthew Hale, relating to an article in the American Banker, March 23.

* * * * * * *

"Without any qualification, I believe that the Bank Merger Act of 1960 is the finest, clearest statement of policy in regard to mergers and competition the bank regulatory agencies have ever had. Problems arose when the *Philadelphia-Girard* case was superimposed upon the Bank Merger Act standards.

"The legislative history, the terms of the act, and your statements on the floor of the Senate should leave no doubt in anyone's mind that section VII of the Clayton Act was not to be used in bank merger cases. Mr. Justice Harlan, in his dissent, clarified this position, and I would hope that someday this magnificent dissent could find its way to the foreground of interpretation in this area of bank supervision.

"A further problem relating to the *Philadelphia-Girard* case is the definition of 'a line of commerce.' As you know the Justice Department allows only commercial banking to be measured as a competitive factor under their regulations yet, from the legislative history, the bank supervisory agencies are required, as they should be, to look at the competitive effects of other financial intermediaries.

"Again, Senator, may I state that I support your philosophy wholeheartedly.

"Kindest personal regards.

"Sincerely yours,

"K. A. RANDALL, *Director.*"

The CHAIRMAN. We have a prospective witness here who has not changed his opinion, his honor, Ben DuBois, former head of the Independent Bankers, now past 80 years old, but his eye is undimmed and his natural forces unabated. He has been against this bill first, last, and always and is waiting for an opportunity to testify against it. He testified on both sides of the Capitol before. We appreciated his

sincerity but we did not agree with his viewpoint, and we turned him down. And Mr. Harry Harding, who is president of the Independent Bankers from the 12th District. He testified before. He has asked to testify again.

They were consistent. They want first, last, and always to put this business in the hands of the Justice Department with an absolute veto. That is what they want—an absolute veto for the Justice Department. That is their viewpoint.

But that is the history, and, as I say, anybody can change his mind if he wants to, but that is what we have done in the past.

The Chair recognizes the Senator from Utah.

Senator BENNETT. Mr. Chairman, I made a few notes as this discussion has gone along, but I think they would tend to take the record off of this very clear central path that has been followed. And since I agree so thoroughly with the chairman and with the position of the Chairman of the Federal Reserve Board, I do not think I am going to follow these rabbits out into the brush, so to speak.

But I would like to put into the record at this point a statement on competition among banks which was contained in a statement made by the chairman on the floor of the Senate on May 3, 1965. It is part of a letter he wrote to Mr. Ralph L. Zaun, of the Independent Bankers Association, and he is quoting from the report of this committee in reporting out the Bank Merger Act in 1959. This is his statement on competition.

> Vigorous competition between strong, aggressive, and sound banks is highly desirable; lack of competition, restraints on competition, and monopolistic practices are undesirable. Competition in banking takes many forms—competition for deposits by individuals and corporations and by personal and business depositors; competition for individual, business, and governmental loans; competition for services of various sorts. Competition for deposits increases the amounts available for loans for the development and growth of the Nation's industry and commerce. Competition for loans gives the borrowers better terms and better service and furthers the development of industry and commerce. Vigorous competition in banking stimulates competition in the entire economy, in industry, commerce, and trade. There is no question that competition is desirable in banking, and that competitive factors should be considered in all aspects of the supervision and regulation of banks.

As I read that, this indicates that in the opinion of the chairman there are many varieties of competition between banks, and competition between banks is not limited as it is in many businesses to competition in sales—competition between banks is more intricate. He did not have anything to say about competition between banks and savings and loans and other lending agencies.

The Senator from Wisconsin raised the question of the necessity for small business loans on the theory that the banks were failing and that if the banks were doing their job there would be no need for a Small Business Administration to make loans. And the Governor's reply was that this gets into the question of risk and the question of credit judgment.

Mr. Martin, do you have any idea of the percentage of the total loans that is made by the Small Business Administration? How nearly does the commercial banking structure fill the loan need of the country? Is it 99 percent? Ninety-five percent?

Mr. MARTIN. It is a very high percentage. I do not have the figure.

Senator PROXMIRE. I think it is about 99 percent. I think SBA has made loans of the number of about 25,000 to 30,000 in the last 10 years, although there are 4,500,000 small business. So only 1 out of 200 has gotten a loan from the SBA.

Senator BENNETT. Can we assume only 1 out of 200 has failed to get satisfactory credit support from the bankers?

Senator PROXMIRE. Oh, no; I do not think that follows.

The CHAIRMAN. Well, can we put in the record that no commercial bank has asked us to pay off bad debt losses, but the Small Business Administration has charged to the Government $144 million of bad debt losses. Would that be some indication of what is going on?

Senator BENNETT. I am reminded many of the SBA loans have bank participation, so it is a question of spreading the risk rather than rejecting it entirely.

I was interested in the comment of the Senator from Wisconsin about the fact that we went a long time in Washington without any new banks. I will ask the Chairman this question. Do you think, during those years, that the services of the banking industry in Washington progressively declined until we actually needed a new bank?

Mr. MARTIN. Well, I have not made a detailed study of it, but I am quite confident in my own mind that the banking services in Washington have been very satisfactorily filled during the time I have been here.

Senator BENNETT. We have a branching situation in Washington. It would be interesting to go back over this period of time and see how many banking facilities were available, how they have grown in number, even though in most cases—all cases I guess—they represent an increase in branches rather than an increase in parent corporations.

Senator PROXMIRE. I just have that old Brandeisian irrational love of independent business and small business, and I like to see independent banks develop rather than branches wherever possible. I realize that you could make a strong case for monopoly or for semimonopoly or for duopoly, oligopoly, whatever you want to call it. I prefer, however, to have as much independence as possible and as much competition.

And maybe it is irrational, maybe it is not economic even, but I wanted to dramatize the fact that there has not been the kind of growth and expansion in the number of banking institutions.

I think you can make a strong case, as you are making, that perhaps from a strictly economic standpoint the community has not suffered very greatly. But from a social standpoint I think it would be far better if we had more banks.

The CHAIRMAN. Well, the Chair would like to say he used to share that viewpoint, a great admiration for the small banks, 50 years ago, and he still admires small independent banks and thinks there is a place for them.

Senator BENNETT. I have no other comment, Mr. Chairman.

The CHAIRMAN. The Senator from Illinois.

Senator DOUGLAS. Mr. Martin, I regret presence at another committee prevented me from hearing your statement. But I have read the text.

I would like to ask if the testimony which you have given and the attitude which you adopt constitute your personal views or the attitude of the Federal Reserve Board.

48-140—65——4

Mr. MARTIN. The attitude of the Federal Reserve Board.

Senator DOUGLAS. This was taken at a meeting of the Board?

Mr. MARTIN. At a meeting of the Board, sir.

Senator DOUGLAS. What was the vote?

Mr. MARTIN. The vote was unanimous.

Senator DOUGLAS. The vote was unanimous?

In the case of the merger of Manufacturers Trust and Hanover, was that decided by vote of the Board?

Mr. MARTIN. By a vote of the Board. The vote was 4 to 2.

Senator DOUGLAS. Four to two?

Mr. MARTIN. Four to two, sir.

Senator DOUGLAS. Do you want to state for the record those who voted affirmatively and those who voted negatively?

Mr. MARTIN. The two dissenters were Governor King and Governor Robertson.

Senator DOUGLAS. There are seven members of the Board. Did one member——

Mr. MARTIN. One member absent. George Mitchell had just become a member of the Board but had not yet been able to participate.

Senator DOUGLAS. One of the eminent members of your Board, Mr. Robertson, has been advocating there should be a centralization of the examining functions. At present, as I understand it, the Comptroller of the Currency examines national banks, you examine State banks which are members of the Federal Reserve System, and FDIC examines State banks that are insured but not members of the Federal Reserve System. Is that correct?

Mr. MARTIN. That is correct.

Senator DOUGLAS. Now, there are proposals that these functions be concentrated in one examining body. If this were to be done, would you favor centralization of the approval of mergers on the banking end?

Mr. MARTIN. Yes, I would think so. If you had an independent banking commission such as he suggests, I would think this would be something that could be included in that.

Senator DOUGLAS. And you would be willing to cede the power of the Federal Reserve and confine yourselves to regulation of the money supply? Is this right?

Mr. MARTIN. Assuming that this commission were set up by the Congress; yes.

Senator DOUGLAS. Yes, I understand. And was not the Federal Reserve Board?

Mr. MARTIN. What?

Senator DOUGLAS. And was not the Federal Reserve Board?

Mr. MARTIN. And was not the Federal Reserve Board.

Senator DOUGLAS. You would be very glad to rid yourselves of the matter of examinations and of regulation of mergers?

Mr. MARTIN. That is not a Board position as such.

Senator DOUGLAS. Oh, I see.

Mr. MARTIN. Governor Robertson has advocated that.

Senator DOUGLAS. What is your position on that?

Mr. MARTIN. My position is still up in the air, so to speak.

Senator DOUGLAS. Oh, I see. How far up in the air?

Mr. MARTIN. Quite a distance.

Senator DOUGLAS. Quite a distance? As high as the fence?

Mr. MARTIN. Yes. Higher than that.

Senator DOUGLAS. And sitting on each side of it?

Mr. MARTIN. And sitting on each side of it.

Senator DOUGLAS. Mr. Chairman, I was interested in your statement of the history of the 1960 act. With your permission, I would like to include supplemental views submitted at that time by four members, Mr. Proxmire, Mr. Clark, Mr. Muskie, and myself. They are found on pages 25 to 29, inclusive, of the report of the committee, in which we say we would have preferred to have given the Attorney General even more influence to stop bank mergers when in his judgment competition might be substantially reduced. And while I believe there was not a rollcall on the measure, there were some of us who differed from the position taken by our distinguished chairman.

The CHAIRMAN. If I might say so at that point, the Senator indicated there was a difference of opinion there and he offered the opinion that the Senator from Wisconsin probably supported the amendment proposed by Senator O'Mahoney on the floor. But then when we came to final passage of the bill all the Members of the Senate took the same position that Chairman Celler did on the House side—"We need a bank merger bill." Some added, "This doesn't go as far as we'd like to go but we'll go for this."

Senator DOUGLAS. Well, I merely wanted to complete the historical record by asking that these pages be included. Has that been granted?

The CHAIRMAN. Yes.

Senator DOUGLAS. Thank you.

(The supplemental views referred to follow (S. Rept 196 appears at p. 247):)

SUPPLEMENTAL VIEWS OF MR. DOUGLAS, MR. CLARK, MR. PROXMIRE, AND MR. MUSKIE

The committee has reported and the Senate has passed legislation dealing with bank mergers in both the 84th and 85th Congresses. Those measures were, however, markedly deficient because antitrust factors were not given sufficient weight and the Deparrment of Justice was not given a voice in dealing with mergers. Before reporting this year's bank merger bill, however, the committee amended it to give the Attorney General the chance to be heard in all bank merger cases. Thus, S. 1062, as amended and reported by the committee, makes a real step forward.

We would have preferred to have given the Attorney General even more influence to stop bank mergers when, in his judgment, competition might be substantially reduced. Under the committee bill, however, he can at least spotlight the issue and force the Federal banking agencies to take his position into account.

It is proper for the bill to require the three Federal banking agencies to pass on bank mergers within their respective spheres of operation. Thus, prior consent would be necessary from the Comptroller of the Currency if the continuing bank is a national bank; the Federal Reserve Board if the continuing bank is a State bank and a member of the Reserve System; and the Federal Deposit Insurance Corporation if the continuing bank is a nonmember insured State bank. Similarly, we favor the provision of the bill requiring the three banking agencies to consider the banking factors of each merger as set forth in section 6 of the Federal Deposit Insurance Act. These agencies should initially process the proposed mergers of banks, which are already within their respective examining jurisdictions, and examine the banking aspects of each transaction.

But granting authority to the three Federal banking agencies to approve or disapprove mergers, without at least giving a voice to the Department of Justice, is not enough to assure that competitive factors will be given sufficient weight. The main purpose of the examining functions of the banking agencies is to assure the financial health of the banks for the protection of depositors. Obviously

if a bank has less competition, it can more easily keep itself financially healthy, but this may be done at the expense of the public, which depends on competition to keep charges low and to provide for an adequate development of new businesses.

The Federal banking agencies have apparently worried very little about the increasing number of bank mergers. Only after the House passed the Celler bill covering bank mergers by asset acquisition under the Clayton Antitrust Act did they finally propose a bill themselves. The provisions of their bill are included in the bill reported by the committee, but the committee has also given a voice to the Department of Justice.

Aside from a lack of leadership toward stemming the recent tide of bank acquisitions, these agencies have a poor record of disapproving mergers under the present laws.

From 1950 through 1958, for example, the Office of the Comptroller of the Currency approved 731 bank mergers and consolidations involving in respect to banks absorbed total resources of approximately $11 billion. During the period from 1950 to May 1955, that Office did not disapprove a single merger application on the basis of the need for competition. During the entire 9-year period, the Comptroller disapproved only 22 mergers because of such reasons. This is indicated in the following table:

Year	Mergers approved by the Comptroller of the Currency [1]		Mergers disapproved by Comptroller of the Currency on basis of competitive considerations	
	Number of absorbed banks	Total resources of absorbed banks	Number of cases	Total resources of banks which would have been absorbed
1950	52	$576,464,143	0	0
1951	30	384,389,647	0	0
1952	59	517,662,108	0	0
1953	67	523,680,925	0	0
1954	126	2,058,262,234	0	0
1955	126	2,015,225,452	12	$182,712,000
1956	105	2,380,816,965	8	355,018,675
1957	83	1,142,000,000	0	0
1958	83	1,704,645,259	2	198,985,000
Total	731	11,303,146,733	22	736,715,675

[1] See hearings before Antitrust Subcommittee, House Committee on the Judiciary, on H.R. 264 and H.R. 2143 (premerger notification), pp. 146–171 (85th Cong., 1st sess.). Data for 1958 was supplied to the Antitrust Subcommittee by letter from the Comptroller of the Currency, dated Mar. 16, 1959.

Source: Comptroller of the Currency.

The Federal banking agencies plead that they had insufficient legislative criteria upon which to base disapproval of mergers. But their bill, and their testimony in favor of it, shows only too clearly that they have very little feeling for the need for competition. That is why giving the Attorney General a voice in the matter is an absolute necessity.

The Department of Justice does not have a perfect record in these matters by any means. But it is less influenced by the banks than the three examining bodies. There is a pronounced tendency in American life for the regulatory bodies which are set up to protect the public to become influenced and largely controlled by the very groups which they were created to regulate. In this respect there is nothing sacrosanct about the bank regulatory agencies. We are not certain how much attention they will pay to the opinions of the Department of Justice or how vigorously the Department itself will act. But there will be at least a greater chance that the need for competition will be stressed than was provided in the bill originally sponsored by the examining agencies.

The control of bank mergers is in part a problem of preserving competition. There are now approximately 13,500 commercial banks in this country. The 100 largest of these banks control approximately 46 percent of the Nation's total bank assets, and more than 48 percent of the total bank deposits. In 10 of the Nation's 16 leading financial centers, 4 banks own more than 80 percent of all commercial assets. Furthermore, in nine of these financial centers, two banks own more than 60 percent of all commercial bank assets. Again in each and every one of the 16 leading financial centers, as indicated by the following table, the first 2 banks own more than 40 percent of all the commercial assets, the first 4 banks, 60 percent.

Percentage of total assets owned by largest banks in principal financial centers

	4 largest	2 largest	Largest		4 largest	2 largest	Largest
New York	60	41.6	22.0	Dallas	84	64.9	32.8
Providence	98	93.3	57.7	Atlanta	92	63.9	33.2
Pittsburgh	87	79.2	61.0	Richmond	84	55.9	33.2
Minneapolis	87	76.0	39.7	Kansas City	75	53.7	34.3
Cleveland	97	72.3	74.7	St. Louis	68	53.5	28.0
Boston	83	71.6	52.2	Baltimore	77	44.9	24.0
Chicago	84	66.9	34.1	Philadelphia	69	44.6	24.7
Detroit	90	65.9	46.5	Washington	60	43.0	[1] 26.3

[1] See interim report of the Antitrust Subcommittee, House Committee on the Judiciary on Corporate and Bank Mergers, p. 30 (84th Cong., 1st sess.). See also House Judiciary Report No. 1417 on H.R. 5948 (Bank Mergers), p. 8 (84th Cong., 1st sess.).

Source: Superintendent of banks, New York State.

Further indications of the degree of concentration in banking is shown in the following table (Congressional Record, Mar. 14, 1957, p. 3317) showing as of June 30, 1956, the proportion of assets for each of 54 cities which are classified as central Reserve and Reserve cities by first, the largest commercial and second, the 5 largest commercial banks.

Assets of (1) the largest commercial bank, and (2) the 5 largest commercial banks as percentages of the total assets of all commercial banks in central Reserve and Reserve cities, 1956

City	Percentages as of June 30, 1956		City	Percentages as of June 30, 1956	
	Largest bank	5 largest banks		Largest bank	5 largest banks
Birmingham, Ala	63.35	99.33	Helena, Mont	55.85	100.00
Little Rock, Ark	33.92	99.38	Omaha, Nebr	47.93	93.92
San Francisco, Calif	58.71	92.95	New York, N.Y	20.99	65.84
Los Angeles, Calif	39.19	93.44	Buffalo, N.Y	52.72	100.00
Denver, Colo	22.48	75.80	Charlotte, N.C	56.21	97.30
Pueblo, Colo	50.42	100.00	Cincinnati, Ohio	33.77	97.50
Washington, D.C	30.51	74.41	Cleveland, Ohio	46.91	97.74
Jacksonville, Fla	34.76	94.90	Columbus, Ohio	53.46	97.26
Atlanta, Ga	35.19	93.71	Toledo, Ohio	59.12	97.61
Savannah, Ga	69.15	97.33	Oklahoma City, Okla	48.31	88.19
Chicago, Ill	25.78	66.61	Tulsa, Okla	42.27	92.20
Indianapolis, Ind	41.09	96.54	Portland, Oreg	47.83	99.78
Des Moines, Iowa	31.17	91.09	Philadelphia, Pa	25.23	79.66
Cedar Rapids, Iowa	66.04	100.00	Pittsburgh, Pa	60.04	93.19
Sioux City, Iowa	25.63	94.05	Memphis, Tenn	45.73	98.97
Kansas City, Kans	24.15	69.37	Nashville, Tenn	38.58	99.62
Topeka, Kans	28.73	92.37	Dallas, Tex	35.84	90.75
Wichita, Kans	47.60	94.37	El Paso, Tex	47.10	100.00
Louisville, Ky	30.70	88.93	Fort Worth, Tex	37.39	88.33
New Orleans, La	39.93	100.00	Houston, Tex	32.90	83.07
Baltimore, Md	23.14	86.53	San Antonio, Tex	27.72	81.91
Boston, Mass	54.03	90.20	Ogden, Utah	67.54	100.00
Detroit, Mich	46.23	96.68	Salt Lake City, Utah	24.47	92.64
Minneapolis, Minn	38.31	87.95	Richmond, Va	29.60	92.64
St. Paul, Minn	55.65	83.95	Seattle, Wash	49.14	99.67
Kansas City, Mo	34.79	78.80	Milwaukee, Wis	48.19	83.10
St. Louis, Mo	27.79	73.21			

Source: Office of the Comptroller of the Currency.

The rapidly accelerating trend toward bank mergers has been a major development in banking over the past 8 years and is partly responsible for the concentration which now exists. As shown by the following table, in the period 1950 through 1958, some 1,330 of the Nation's commercial banks have disappeared by way of mergers and consolidations:

Summary of consolidations, mergers, and purchase and sale transactions, by years

Year	Approved by Comptroller of the Currency		Approved by State banking departments	
	Number of banks	Total resources of absorbed banks	Number of banks	Total resources of absorbed banks
1950	52	$576,464,143	39	$552,435,446
1951	30	384,389,647	54	1,393,302,452
1952	59	517,662,108	40	302,468,222
1953	67	523,680,925	48	676,103,752
1954	126	2,058,262,234	90	2,006,310,444
1955	126	2,015,225,452	99	7,600,107,754
1956	105	2,380,816,965	81	582,992,639
1957	83	1,142,448,371	82	1,159,307,694
1958	83	1,704,645,259	68	854,336,649
Total	731	11,303,595,104	601	15,127,365,052

Of these 1,330 mergers and consolidations, 731 or over one-half involved national bank transactions approved by the Comptroller of the Currency. Total resources of the banks absorbed in these national bank mergers amounted to $11,303,146,733. Another 601 mergers involving absorbed assets of $15,127,-365,052 were approved by State banking departments.

As the banking resources of the various cities become more and more concentrated with these banks closely affiliated by directorates or otherwise with local business companies, the more difficult it will be for competing concerns to get the credit which they need to compete. Financial concentration, therefore, also promotes a greater degree of industrial concentration. Since we believe that competition has great positive virtues, both economically and socially, and that the increasing concentration in finance and industry is dangerous to our society, we naturally favor a stronger bill than the examining and regulatory agencies originally proposed.

Previous bank merger legislation approved by this committee and passed by the Senate would have given the banking agencies discretionary authority to consult with the Attorney General. We agree with the testimony of the Department of Justice that the agencies should consult the Attorney General in every instance so that the enforcement of the statute shall be uniform and in line with the enforcement of the other antitrust laws. While we would have preferred to have given the Attorney General even more influence to stop mergers when he thought competition might be *substantially* lessened, the bill amended by the committee is a vast improvement over previous legislation which only permitted participation of the Department of Justice when desired by the banking agencies.

But we wish to add a word of caution to the Federal Reserve Board, the Comptroller of the Currency, and the FDIC. Their acts will be closely scrutinized by Congress and the country, and, if it should appear that they continue to disregard the need for competition in banking, then at least some Members of Congress will urge that stronger powers be provided to the Department of Justice.

Paul H. Douglas.
Joseph S. Clark.
William Proxmire.
Edmund S. Muskie.

The Chairman. In order to give the background of my bill, I will place in the record, without objection, at the conclusion of these hearings, this committee's report in 1959 and the House Banking and Currency Committee report in 1960. (See pp. 247, 43, and 277.)

I will also place in the record excerpts from the debates on the bill in the Senate and House at the time the act was passed (pp. 295, 299 ff).

In addition, there will be placed in the record copies of the Supreme Court's opinions in the *Philadelphia* and *Lexington, Kentucky*, cases (pp. 355 and 430) and excerpts from several District Court opinions (pp. 446, 455, 459, and 463) together with several statements I made in connection with those decisions and several statements I have made concerning S. 1698 (pp. 36, 37, and 308 ff.).

In addition, there will be placed in the record a brief outline of the legislative history of section 7 of the Clayton Act, prepared by the staff, and resolutions from State and National banking organizations concerning S. 1698 (pp. 324 and 231 ff.).

Senator DOUGLAS. Have you studied the history of bank mergers in Great Britain, Mr. Martin?

Mr. MARTIN. No, I have not, Senator.

Senator DOUGLAS. Well, you know, of course, that five banks virtually control the banking business in Great Britain?

Mr. MARTIN. I do.

Senator DOUGLAS. Have you read Walter Bagehot's "Lombard Street"?

Mr. MARTIN. I have.

Senator DOUGLAS. At the time Bagehot wrote "Lombard Street," he spoke of the large number of country bankers. These country bankers have now virtually disappeared, and they have merged into the five big banks and became branch managers or what not. Gillick's, for instance, went into one of the big banks. I forget which.

And I remember talking a few years ago with a very eminent student of banking procedure in England, who was in no sense a radical, and I asked him if he thought this had been a good development. And he said "No"; that it had concentrated the lending function in a relatively small number of banks. The result had been that small business was not able to get loans as readily as big companies.

I said, "Well, how did it happen?"

"Well," he said, "we woke up after World War I to discover that the merger and consolidation process had taken effect. It was irreversible. We couldn't do anything about it so we have had to live with it."

So that is evidence No. 1.

Now, have you studied the situation in Canada at all?

Mr. MARTIN. I have not studied either the United Kingdom or Canada carefully recently. I have been in both countries, and at one time I wrote a paper on the Bank of Canada when it was being founded. I know their situation.

Senator DOUGLAS. That is a national bank?

Mr. MARTIN. Yes.

Senator DOUGLAS. I have studied it even less, probably, than you have, Mr. Martin, but when I did look at the situation some years ago, as I remember, the lending function was largely dominated by two banks, the Bank of Montreal and—what is the other big one?

Mr. MARTIN. Royal Bank of Canada?

Senator DOUGLAS. The Royal Bank. Do you know what effect this consolidation of banking functions has had upon the structure of business in Canada?

Mr. MARTIN. I would hesitate to express——

Senator DOUGLAS. You ought to go into these issues, Mr. Martin, or have some of your staff go into them. I think you will find Canada

has probably the greatest concentration of industry of any country. They will have monopoly or duopoly in virtually every major industry.

And I have talked with Canadian businessmen and Canadian bankers, and they tell me that this is because the banking function is concentrated, and the branches of the two big banks do not want to lend to small business, that the loans are made by the central authorities in Montreal. I think both of them are in Montreal. They make the decisions. And, as a result there is a virtual monopoly. There may be other factors.

Canada probably has the highest concentration of industry of any major country in the Western World.

And these considerations sometimes, as the Senator from Wisconsin indicated in his statistical table, don't weigh very heavily upon the regulatory bodies, whereas the courts, which have a long record of dealing with the Sherman Act, find this rather familiar ground and are more ready to explore competition.

And I may say, on the question of competition versus monopoly, as the Senator from Wisconsin indicated, these are not terms into which you can classify banks or business concerns as being competitive or monopolistic. Occasionally you can do this. But these are the extremes of a spectrum of intermediate cases. In some cases there is complete monopoly.

And I frankly want to say that I think Mr. Saxon has frequently rendered very good judgment and good service in putting national banks into communities where there has been a State banking monopoly.

But what you run through is a spectrum in which you can have duopoly, control by two, or triopoly, or quadopoly, or oligopoly, control by a relatively few. Yet these are all departures from pure competition.

The theory of pure competition is that there are so many concerns that output of any one enterprise has no effect on price. We can't apply that to banking. But there is a difference as to how far you move in the spectrum toward monopoly and how far you move toward competition.

And it is this difficult intermediate field that puzzles us and puzzles you, and I think the figures seem to indicate that on the whole the FDIC and the Comptroller, yes even the Federal Reserve Board, tend to resolve most of these difficulties in favor of mergers and that the courts do not adopt quite the same attitude.

In any event, Mr. Chairman, I think you have raised a very important issue. I think these various aspects need to be considered.

The CHAIRMAN. The chairman hopes that Chairman Martin will consider it. A great statesman, Edmund Burke, said nations do not learn by experience. If there is anything in Great Britain that will help us, I would be glad to know about it.

At the present time I think they are outdoing us in the trend to socialism. They don't have any 10th amendment in a written constitution that says that powers not delegated to the Federal Government are reserved to the States and the people thereof. It's all National Government. The Bank of England is a national bank. All the banks are controlled by that bank.

We have nearly 14,000 banks, and about twice as many State banks as we have National banks.

I can't quite see the analogy between banks in that form of government over there being consolidated and the possibility that, if we do pass my bill, 8,000 or 9,000 State banks are going to be put out of commission and virtually you will wind up with 5 banks, 1 in New York, 1 in Chicago, 1 in San Francisco, and—well, let's put——

Senator BENNETT. Houston?

The CHAIRMAN. Out there somewhere.

But, at any rate, I think I would like to have these studies. I just think there happen to be some very material differences between the forms of government we have. And one of them is they have no antitrust laws in Great Britain.

Senator DOUGLAS. That is true.

The CHAIRMAN. They advocate cartels. The Government advocates them. The board of trade advocates them.

Senator DOUGLAS. Not quite; they tolerate them.

The CHAIRMAN. Well, it is a big subject. Now, there cannot be any question about this fact: Successfully functioning banks are now essential to our economy.

Senator DOUGLAS. Yes.

The CHAIRMAN. And our objective is to have the best laws under which they can function the most effectively in providing credit where credit is needed and for expansion of our business, because, as Alexander Hamilton said years ago, you can't expand the economy of any nation unless you have some institution that will gather up the savings of the people and put them to work.

And that is the essence of our banking system.

There was a little bank where I used to live—a $50,000 bank. It might wither on the vine for a long time. Some banks have made it mighty well. But I would say off and on about half of them have been prosperous and the other half are glad when somebody comes along and says, "Wouldn't you like to merge? We are doing a little better than you are, and we will carry you over the hump."

Senator PROXMIRE. Will the Senator yield very briefly?

The CHAIRMAN. Yes.

Senator PROXMIRE. I would like to ask: Is it possible, Governor Martin, to indicate now—or, if not now, for the record—in how many of the 142 applications you received an adverse or the strongest adverse classification from the Attorney General? How many of these were approved? And in how many of the 17 that were denied did you receive that strongly adverse recommendation?

Mr. MARTIN. We will go over the list and give it to you, Senator.

Senator PROXMIRE. Thank you.

(The information requested follows:)

SCHEDULE I.—*Applications approved and denied by the Board under the Bank Merger Act from May 13, 1960, to May 20, 1965, with respect to which the Board received a strongly[1] adverse report on competitive factors from the Department of Justice[2] (figures shown for each bank are total deposits, in thousands)*

Applications	Approval dated	Denial dated	Tenor of other reports on competitive factors	
			Federal Deposit Insurance Corporation	Comptroller of the Currency
Peoples Trust Co. of Wyomissing, Pa., Wyomissing, Pa. ($41,394). City Bank & Trust Co. of Reading, Reading, Pa. ($33,705).	July 21, 1960	----------	Not unfavorable.	Not unfavorable.
Citizens Fidelity Bank & Trust Co., Louisville, Ky. ($260,045). Bank of Louisville, Louisville, Ky.[3] ($23,588).	----------	Aug. 18, 1960	do	Do.
Deposit Guaranty Bank & Trust Co., Jackson, Miss. ($140,340). Rankin County Bank, Brandon, Miss. ($6,501).	----------	Dec. 14, 1960	Unfavorable.	Do.
Citizens Fidelity Bank & Trust Co., Louisville, Ky. ($203,682). Bank of Louisville, Louisville, Ky.[3] ($19,353).	----------	Jan. 13, 1961	Not unfavorable.	Do.
Linden Trust Co., Linden, N.J. ($32,922) Union County Trust Co., Elizabeth, N.J. ($81,744).	Feb. 1, 1961	----------	do	Do.
Marine Midland Trust Co. of Southern New York, Elmira, N.Y. ($132,241). First National Bank & Trust Co., Ithaca, N.Y. ($23,525).	----------	Mar. 27, 1961	do	Do.
State Street Bank & Trust Co., Boston, Mass. ($312,753). Rockland-Atlas National Bank of Boston, Boston, Mass. ($102,292).	Apr. 11, 1961	----------	do	Do.
Gloucester Safe Deposit & Trust Co., Gloucester, Mass. ($8,367). The Cape Ann National Bank of Gloucester, Gloucester, Mass. ($6,307).	May 31, 1961	----------	Unfavorable.	Unfavorable.
United California Bank, Los Angeles, Calif. ($1,779,047). Farmers & Merchants Bank, Hemet, Calif. ($5,612).	July 10, 1961	----------	Not unfavorable.	Not unfavorable.
Dauphin Deposit Trust Co, Harrisburg, Pa. ($83,825). Camp Curtin Trust Co., Harrisburg, Pa. ($17,716).	July 12, 1961	----------	do	Do.
State Bank of Albany, Albany, N.Y. ($353,739). The Fort Plain National Bank, Fort Plain, N.Y. ($7,347).	Sept. 6, 1961	----------	do	Do.
Manufacturers Trust Co., New York, N.Y. ($3,464,811). The Hanover Bank, New York, N.Y. ($1,885,721).	do	----------	do[4]	Do.
City Trust Co., Bridgeport, Conn. ($134,590) The West Side Bank, Bridgeport, Conn. ($13,251).	Mar. 23, 1962	----------	Unfavorable.	Do.
Chemical Bank New Tork Trust Co., New York, N.Y. ($3,801,265). Long Island Trust Co., Garden City, N.Y. ($101,601).	----------	Apr. 30, 1962	Not unfavorable.	Do.[5]
The Chase Manhattan Bank, New York, N.Y. ($6,923,000). Hempstead, Bank, Hempstead, N.Y. ($72,000).	----------	do	do[6]	Do.[5]
The Peoples Bank & Trust Co., Grand Haven, Mich. ($12,312). The Spring Lake State Bank, Spring Lake, Mich. ($5,110).	June 25, 1962	----------	do	Unfavorable.
Asbury Park & Ocean Grove Bank, Asbury Park, N.J. ($33,662) The Central Jersey Bank & Trust Co., Freehold, N.J. ($75,320).	----------	June 29, 1962	Unfavorable.	Do.
Peoples Union Bank & Trust Co., McKeesport, Pa. ($103,843). The Bank of Glassport, Glassport, Pa. ($5,294).	Oct. 5, 1962	----------	Not unfavorable.	Not unfavorable.
Union Trust Co. of Maryland, Baltimore, Md. ($245,410). The Liberty Bank, Easton, Md. ($6,518)	Oct. 12, 1962	----------	do	Do.

See footnotes at end of table, pp. 51–52.

SCHEDULE I.—*Applications approved and denied by the Board under the Bank Merger Act from May 13, 1960, to May 20, 1965, with respect to which the Board received a strongly*[1] *adverse report on competitive factors from the Department of Justice*[2] *(figures shown for each bank are total deposits, in thousands)*—Continued

Applications	Approval dated	Denial dated	Tenor of other reports on competitive factors	
			Federal Deposit Insurance Corporation	Comptroller of the Currency
The County Trust Co., White Plains, N.Y. ($482.049). The Gramatan National Bank & Trust Co. of Bronxville, Bronxville, N.Y. ($15,911).	Nov. 7, 1962		Not unfavorable.	Not unfavorable.
Bank of Jamestown, Jamestown, N.Y. ($48,718). Clymer State Bank, Clymer, N.Y. ($2,691)	Jan. 14, 1963		do	Do.
Ann Arbor Bank, Ann Arbor, Mich. ($69,582). The Dexter Savings Bank, Dexter, Mich. ($4,760).	Feb. 5, 1963		do	Unfavorable
State Bank of Albany, Albany, N.Y. ($537,142). The Unadilla National Bank, Unadilla, N.Y. ($5,207).		Apr. 26, 1963	do	Not unfavorable.
Chemical Bank New York Trust Co., New York, N.Y. ($5,183,000). Bank of Rockville Centre Trust Co., Rockville Centre, N.Y. ($43, 023).	May 27, 1963		do	Do.
Wilmington Trust Co., Wilmington, Del. ($406,003). Camden office of Baltimore Trust Co., Selbyville, Del. ($2,844,000).	July 23, 1963		do	Do.
Fidelity-Philadelphia Trust Co., Philadelphia, Pa. ($598.937). Liberty Real Estate Bank & Trust Co., Philadelphia, Pa. ($149.944).	Dec. 13, 1963		Unfavorable	Unfavorable
Old Kent Bank & Trust Co., Grand Rapids, Mich. ($349,725). Community State Bank, Grandville, Mich. ($21,274).	Dec. 24, 1963		do	Do.
City Bank & Trust Co., Jackson, Mich. ($93,569). Calhoun State Bank, Homer, Mich. ($3,642)		May 14, 1964	do	Not unfavorable.
Camden Trust Co., Camden, N.J. ($214,005). Merchantville National Bank & Trust Co., Merchantville, N.J. ($17,250).		June 26, 1964	do	Unfavorable.
Provident Tradesmens Bank & Trust Co., Philadelphia, Pa. ($607,359). Second National Bank of Philadelphia, Philadelphia, Pa. ($47,516).	Aug. 7, 1964		Not unfavorable.	Do.
State Bank of Albany, Albany, N.Y. ($441,377). The First National Bank of Cairo, Cairo, N.Y. ($6,037).	Oct. 15, 1964		Unfavorable.	Do.
Wheeling Dollar Savings & Trust Co., Wheeling, W. Va. ($55,338). South Wheeling Bank & Trust Co., Wheeling, W. Va. ($7,639).	Nov. 25, 1964		do	Do.
Worthen Bank & Trust Co., Little Rock, Ark. ($106,380). Bank of Arkansas, Little Rock, Ark. ($6,936)	Dec. 7, 1964		Not unfavorable.	Not unfavorable.
Wells Fargo Bank, San Francisco, Calif. ($3,545,000). Bank of Amador County, Jackson, Calif. ($12,481).	Dec. 16, 1964		do	Do.
The Summit Trust Co., Summit, N.J. ($67,686). The Elizabethport Bank Co., Elizabeth, N.J. ($44,544).	Dec. 17, 1964		do	Do.
United California Bank, Los Angeles, Calif. ($2,653,259). Bank of Ceres, Ceres, Calif. ($3,636)	May 12, 1965		do	Do.

[1] Competitive factor reports classified as strongly adverse are those in which the Department of Justic stated that the competitive effect was, for example, strongly, significantly, or substantially adverse.

[2] Also shown are the views of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. Their reports are not classified as strongly, significantly, or substantially adverse, but merely as finding the competitive effect to be unfavorable or not unfavorable.

[3] 2 different applications by same 2 banks.

[4] This report on competition construed as favorable by the court; however, the Federa Deposit Insuranc Corporation stated "* * * it is impossible to come to a decisi ve conclusion wthout consideration of the banking factors."

(Footnotes continued on p. 52.)

FOOTNOTES TO SCHEDULE I—Continued

[5] These conclusions subsequently reversed by Comptroller of the Currency Saxon who concluded the competitive effects would be unfavorable.
[6] *United States* v. *Manufacturers Hanover Trust Company*, U.S. District Court N.Y., May 10, 1965 (61 Civ. 3194).

NOTE.—The reports on competitive factors provided for in the Bank Merger Act are advisory only. Under the act, such reports are to be made without regard to the banking factors which the Federal banking agency responsible for passing on the particular merger application must consider in deciding whether to approve or disapprove the application. Thus, an adverse advisory report should not be construed as a recommendation for disapproval of the merger by the reporting agency or agencies, and a "favorable" or "not unfavorable" report should not be construed as a recommendation for approval of the merger by the reporting agency or agencies.

SCHEDULE II.—*Tenor of competitive factor reports submitted to the Board in connection with applications denied by the Board from May 13, 1960, to May 20, 1965, not included in schedule I* [1] *(figures shown for each bank are total deposits, in thousands)*

Applications	Denial date	Tenor of reports on competitive factors		
		Department of Justice	Comptroller of the currency	Federal Deposit Insurance Corporation
Deposit Guaranty Bank & Trust Co., Jackson, Miss. ($140,340). Bank of Hazlehurst, Hazlehurst, Miss. ($4,542).	Oct. 20, 1960	Unfavorable.	Not unfavorable.	Not unfavorable.
Citizens Commercial & Savings Bank, Flint, Mich. ($157,719). Old Corunna State Bank, Corunna, Mich. ($8,051).	Jun. 19, 1961	do	do	Do.
United California Bank, Los Angeles, Calif. ($1,779,047). The First National Bank of La Verne, La Verne, Calif. ($6,476).	Nov. 16, 1961	do	do	Do.
United California Bank, Los Angeles, Calif. ($2,136,978). The First National Bank of Vista, Vista, Calif. ($12,271).	Jun. 20, 1962	Not unfavorable.	do	Unfavorable.
Dauphin Deposit Trust Co., Harrisburg, Pa. ($105,906). The First National Bank of Mount Holly Springs, Mount Holly Springs, Pa. ($3,382).	July 13, 1962	Unfavorable.	do	Not unfavorable.
Union Trust Company of Maryland, Baltimore, Md. ($348,032). The Farmers National Bank of Annapolis, Annapolis, Md. ($21,013).	Nov. 8, 1963	do	do	Unfavorable.
The Lorain County Savings & Trust Co., Elyria, Ohio ($58,051) The Central Bank Co., Lorain, Ohio ($33,900).	Dec. 23, 1963	do	Unfavorable.	Do.

[1] Also shown are the views of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. Their reports are not classified as strongly significantly, or substantially adverse, but merely as finding the competitive effect to be unfavorable or not unfavorable.

NOTE.—The reports on competitive factors provided for in the Bank Merger Act are advisory only. Under the act, such reports are to be made without regard to the banking factors which the Federal banking agency responsible for passing on the particular merger application must consider in deciding whether to approve or disapprove the application. Thus, an adverse advisory report should not be construed as a recommendation for disapproval of the merger by the reporting agency or agencies.

Senator PROXMIRE. Then the other point I would like to bring up, Mr. Chairman, is this: The annual report of the Board of Governors of the Federal Reserve System has a very excellent concise summary of the Manufacturers Trust-Hanover situation, including a summary of the Attorney General's position and the position of the Board of Governors. It is two pages. I hope it can be inserted in the record.

The CHAIRMAN. That should be in the record, because that is a classical example of misdirected Government activity.

(The excerpt above referred to follows:)

[From the 48th Annual Report of the Board of Governors of the Federal Reserve System, 1961]

Description of each merger, consolidation, acquisition of assets or assumption of liabilities approved by the Board of Governors during 1961

* * * * * * *

Name of bank, and type of transaction [1] (in chronological order of determination)	Resources (in millions of dollars)	Banking offices	
		In operation	To be operated
No. 26—Manufacturers Trust Company, New York, N.Y.	3,845.4	120	130
to merge with			
The Hanover Bank, New York, N.Y.	2,156.4	10	

[1] Except where specifically stated the merger, etc., was effected under the charter of the first named bank.

SUMMARY REPORT BY ATTORNEY GENERAL (MAY 19, 1961)

Two of New York City's leading commercial banks seek approval to merge. If approval is granted, Manufacturers Trust Company will merge with the Hanover Bank.

There are numerous adverse competitive effects which would result from the proposed consolidation. They include the following:

1. Local markets (New York City and the New York Metropolitan Area)
   (*a*) The deposit and loan concentration indices in New York City are unduly high.
      (1) Five banks account for:
         (a) 70.59 percent of demand deposits.
         (b) 73.09 percent of commercial and industrial loans.
         (c) 70.29 percent of total deposits.
         (d) 72.24 percent of total loans.
   (*b*) Concentration of deposits and loans in New York City will be unduly augmented if the proposed merger is consummated:
      (1) Five banks will account for:
         (a) 76.02 percent of demand deposits (an increase of 5.43 percent).
         (b) 78.36 percent of commercial and industrial loans (an increase of 5.27 percent).
         (c) 75.22 percent of total deposits (an increase of 4.93 percent).
         (d) 77.19 percent of total loans (an increase of 4.95 percent).
   (*c*) Substantial actual and potential competition between the merging banks will be eliminated in at least the following services.
      (1) Demand deposits.
      (2) Commercial and industrial loans.
2. National market
   (*a*) Concentration of deposits, loans, and capital in the United States as a whole will also be increased if the proposed merger is consummated.

This proposed merger is but the latest of a series of mergers among major New York City banks in recent years which have eliminated the competition between the merging banks and substantially increased concentration in commercial banking in that leading financial center of the nation. The proposed merger will eliminate another substantial factor in competition, eliminate substantial existing and potential competition between the merging banks, increase the trend toward oligopoly in commercial banking, and further adversely affect the ability of the smaller banks to effectively compete unless they too merge or consolidate with other banks.

BASIS FOR APPROVAL BY BOARD OF GOVERNORS (SEPTEMBER 6, 1961)

As of December 31, 1960, there were in New York City 33 banks conducting a general commercial banking business; they operated 569 banking offices and had aggregate deposits of approximately $37.3 billion. In terms of deposits, Manufacturers Trust Company and Hanover Bank were the fifth and eighth largest of the commercial banks; they held, respectively, 9.3 per cent and 5.1 per cent of the deposits of such banks and 21.1 per cent and 1.8 per cent of commercial banking offices. The proposed merger would combine these two banks to form the third largest commercial bank in New York City, which would hold 14.4 per cent of total commercial deposits and 22.9 per cent of commercial banking offices.

While banking comparisons on a national basis are in general less significant than local or regional comparisons, it may be noted that in terms of deposits Manufacturers and Hanover ranked sixth and fourteenth among all commerical banks of the country, and held 1.5 per cent and .8 per cent, respectively, of the deposits of those banks. The total deposits of the 22 commercial banks in the United States having deposits of $1 billion or more aggregated $68.9 billion, of which Manufactuers had 5.0 per cent and Hanover 2.7 per cent. The resulting bank would rank fourth in size nationally, with 2.3 per cent of deposits of all commercial banks and 7.8 per cent of deposits held by the $1 billion group.

Although Manufacturers Trust Company has many large accounts, through its widespread branch system it has long emphasized "retail banking," that is, the serving of large numbers of relatively small depositors and small borrowers. The business of Hanover Bank is confined almost exclusively to banks and large corporate customers, and it is characterized as a "wholesale bank." The combining of these two generally different and complementary banking functions would serve the public interest and the convenience and needs of the community through greater opportunity for diversification of risks, improved specialization, and broader banking services. While the proposed merger would increase the percentage of deposits held by the five largest commercial banks in the city from 71.9 per cent to 77.0 per cent and the offices of these banks from 73.5 per cent to 75.3 per cent, this is more than offset by the resulting advantages. The continuing bank, with its increased diversification and larger lending limit, would be able to compete more effectively, particularly in the national and international fields, with the two largest banks in New York. The merger would tend to stimulate competition without significantly affecting the number or competitive strength of alternative sources of banking services.

Senator BENNETT. Mr. Chairman, I would like to add one little bit more to the record. This is from the hearings in 1959, the statement of Governor Robertson speaking for the Federal Reserve Board, expressing his approval of the legislation that was before us at that time.

The CHAIRMAN. Well, that is pertinent and that may be entered in the record.

(The excerpt from the 1959 hearing follows:)

Mr. ROBERTSON. Then I will subject myself to any questions that you would like to ask.

First, let me say that we believe there is a real need for legislation to curb bank mergers which lessen competition to a degree incompatible with the public interest. Hence, we are in complete accord with the objective of all nine bills pending before Congress on this subject.

Second, we believe that every proposed merger of insured banks should be scrutinized by the appropriate Federal supervisory agency before it is consummated and should be prohibited until approval of that agency is received.

Third, we believe that every such Federal supervisory agency should be explicitly required to consider the competitive effects of such a merger along with all the other aspects thereof.

We think approval should not be given unless the adverse effects of a lessening of competition are outweighed by the favorable factors.

And, fourth, we believe that in order to achieve as much uniformity as possible in weighing the competitive factor, without disrupting the existing jurisdictional pattern, the agency having jurisdiction should be required to seek the views of the other two agencies with respect to this factor and be authorized to request the opinion of the Attorney General with respect to that question.

As we see it, S. 1062 does exactly this, and, hence, we favor its enactment. In fact, we favor it over other approaches such as those which would amend the Clayton Act, because, first, it provides for advance approval rather than an enforcement proceeding designed either to enjoin the consummation of the merger or to unscramble an accomplished merger. Secondly, it requires that the competitive factor be scrutinized carefully without making the decision hinge on that factor alone, and it buttresses the scrutinization by requiring that the agency seek the views of the other agencies on this factor.

The CHAIRMAN. Governor, you have nothing to add at the present time?

Mr. MARTIN. Nothing further, sir.

The CHAIRMAN. We thank you very much.

(The articles previously referred to follow.)

[From the Wall Street Journal, May 5, 1965]

BREAKING UP A BANK: ATTEMPT BY KENTUCKIANS TO UNSCRAMBLE MERGER AROUSES WIDE INTEREST—SHAREHOLDER, DEPOSITOR WOES VEX LEXINGTON BANK AS IT COMPLIES IN ANTITRUST CASE—NO SIGN OVER THE FRONT DOOR

(By James P. Gannon)

LEXINGTON, KY.—The biggest bank in town here is suffering a sort of financial schizophrenia. It's trying to split itself in two.

The split-up stems from a year-old U.S. Supreme Court ruling that the 1961 merger of Lexington's First National Bank & Trust Co. and Security Trust Co. violated the Sherman Antitrust Act by unreasonably restraining banking competition here. The merged bank, First Security National Bank & Trust Co., now is struggling with a Pandora's box of problems never before opened, but threatening to vex much bigger banks from coast to coast.

Among the problems: How to fairly compensate stockholders who bought shares in the merged bank, and how to divide deposits and loans which represent new business since the merger.

First Security Bank's attempt to unmerge could be the first of many. A Federal court recently ruled that Manufacturers Hanover Trust Co. of New York, the Nation's fourth largest bank, resulted from an illegal merger. Similar suits are pending against Continental Illinois National Bank & Trust Co. of Chicago, the seventh largest U.S. bank, and Crocker-Citizens National Bank of San Francisco.

BANKS COUNTED ON IMMUNITY

In the past 3 years there have been 465 U.S. bank mergers. Bank mergers long were thought to be immune from antitrust suits once they were approved by Federal banking authorities—either the Comptroller of the Currency, the Federal Reserve Board or the Federal Deposit Insurance Corp. But since 1961 the Justice Department has attacked seven "approved" mergers.

The Justice Department won a major victory in 1963 when the Supreme Court, in a landmark decision, held that the Clayton Antitrust Act did indeed apply to bank mergers, even those blessed by Federal regulators. The decision scuttled a proposed merger of Philadelphia National Bank and Girard Trust Corn Exchange Bank.

The resulting confusion among bankers over whether approved mergers are safe to complete has led to introduction of a bill by Senator A. Willis Robertson, Democrat, of Virginia, chairman of the Senate Banking and Currency Committee. It would exempt bank mergers from antitrust prosecution and give Federal banking regulators sole authority to approve mergers. The immunity from prosecution would extend to at least some past mergers. But administration backing for the bill is still uncertain and passage isn't likely without White House support.

Another bill introduced in the House would combine the three bank regulatory agencies into one and require consultation with the Justice Department before approval of a bank merger is given. It would not preclude later Justice Department antitrust action, however.

BIG CASES ARE PENDING

Meanwhile, the big bank merger antitrust cases are reaching crucial stages in courts in New York, Chicago, and San Francisco. Manufacturers Hanover and the Justice Department now have until May 20 to present to a Federal district court a plan to settle their antitrust case. In March the court ruled illegal the 1961 merger of Manufacturers Trust Co. and the Hanover Bank, but left it to the parties to try to agree what relief is appropriate. The court has granted three extensions of its original deadline for the filing of a settlement plan. The Government wants a complete breakup of the bank, which has assets of more than $7 billion.

On June 1, Government attorneys will begin trying their case aimed at breaking up the Crocker-Citizens National Bank in San Francisco. The $3.7 billion bank was formed in a 1963 merger of Crocker-Anglo National Bank, San Francisco, and Citizens National Bank of Los Angeles. Later this year or early in 1966, Continental Illinois of Chicago will go on trial. Its assets total $4.8 billion.

Lexington's First Security Bank is finding that the problems of unmerging "have never been solved before—there are no guidelines or precedents," according to LeRoy M. Miles, the moon-faced, bespectacled president whose gentle Kentucky drawl conveys a sense of resigned willingness to comply with the law.

The Justice Department doesn't belittle the magnitude of the problems of breaking up merged banks. It notes that this is precisely why the Government sought injunctions to prevent each of the mergers now before the courts. The injunction pleas failed, so now the agency insists on undoing the mergers despite the difficulties.

BANK IS INCOGNITO

Mr. Miles presides over the dissolution of his bank from a compact, wood-paneled office on the ground floor of the 15-story yellow brick bank building that dominates Main Street here. A stranger in town has to try a side entrance to make sure this is First Security Bank; all signs have been removed from the Main Street entrance and the side door proclaims the institution to be "First National Bank & Trust Co."

The sign confusion is one visible indication that the splitup is underway. It stems from an order last March by Federal District Judge Mac Swinford, who is overseeing the unmerging of the bank. He ordered First Security to take "all necessary steps to create a separate, competitive, and independent commercial bank which shall be the equivalent of the former Security Trust Co." He told First Security to change its name back to First National, destroy First Security checks, forms, and stationery, and stop advertising under the name as soon as the new Security Trust opens its doors for business.

In ordering the splitup "without delay" on March 18, Judge Swinford said the new Security Trust bank should have its former name, "its directors, its officers, and personnel, its offices, furniture, and equipment, its capital surplus and undivided profits and loans, savings, checking and trust accounts plus its proportionate share of any increments and improvements" since the merger. He ordered "all capital stock to be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders."

In a clarifying order last week, Judge Swinford, in effect, directed that present shareholders of First Security become shareholders, in both First National and Security Trust in proportion to their current holdings in the merged bank. This would create a common ownership of both banks when the court decides to release the new Security Trust capital shares.

Meanwhile, since February, First Security has faced a $100-a-day contempt of court fine levied by Judge Swinford for what he called unnecessary delays in accomplishing the splitup. However, the Supreme Court stayed the fine on appeal from the bank; the Justice Department sided with the bank in arguing the judge erred in the contempt citation. The High Court will decide if the fine is justified.

Mr. Miles declines to discuss publicly the exact steps the bank now may take to unmerge. But he outlined some of the problems First Security must overcome in an affidavit filed with the Supreme Court. For example, he noted the merged bank held 4,186 checking accounts and 4,051 savings accounts that neither bank held before the merger.

A RUN ON THE BANK?

"If a court should order these deposits placed in one or the other of the two re-created banks," Mr. Miles warned, "it would take the customer only a matter of minutts to move it elsewhere." He added: "It is a reasonable assumption that an appreciable number of all deposit customers, old and new, would leave both banks." There might even be "a run on the bank," he asserted.

Rival bankers in Lexington confide there has been nothing like a massive depositor withdrawal from Fist Security, so far at least. One competitor says the number of accounts switched to his bank is "trifling." First Security has four competitors in Lexington but it is by far the largest with assets of $135 million; at the time of the merger, First National had 40 percent of bank assets in the city and Security Trust had 13 percent. Managements of the two banks argued then that the merged institution, with greater resources, would better meet the borrowing needs of Fayette County's 132,000 citizens and would offer savers maximum security.

A greater withdrawal rate is more likely after the accounts actually are divided. A local official of Liggett & Myers Tobacco Co., a big depositor which operates a plant in Lexington, says if the company checking account is assigned to the new Security Trust Co., "We would close that account and deposit funds in the First National. We've always banked at the First National."

Loans also must be divided. Because a certain ratio of loans to deposits is necessary to keep a bank sound financially, the possible loss of depositors is real reason for concern. "If a substantial number of depositors choose to leave the bank assigned to them, that bank could easily end up with more loans than deposits," Mr. Miles said. "It is very likely that regulatory authorities would close the bank immediately if such occurred."

BIG LOANS POSE PROBLEM

Some present loans might be illegal when transferred to either one of the reestablished banks. "The merged bank now holds 15 loans where the amount of each loan exceeds $250,000," Mr. Miles said. "The total of these loans is slightly less than $6 million. None of these loans could be assigned to First National because its legal lending limit was $250,000. The deposit structure that presumably would be set aside for Security Trust would not support such a volume of loans of that size."

The bank divorce also raises a legal question. First Security has been designated trustee for 83 trust accounts with assets of more than $4 million. Some of these trusts are irrevocable. The question is whether a Federal court can take irrevocable trusts away from the designated trustee—First Security—and place them in the hands of a newly created bank. Jurisdiction over trusts rests with State and county probate courts in Kentucky. Bank lawyers admit they are baffled and the State's attorney general says there is no precedent to follow.

Satisfying stockholders is another of the bank's big headaches. More than 190 holders of more than 24,000 of the bank's 200,000 capital shares bought their stock after the merger. They invested in First Security, not First National or Security Trust. It is at least questionable whether the stockholders will be satisfied with shares in two smaller banks competing against each other. A rival banker predicts a rash of lawsuits by disgruntled stockholders against First Security management.

Some stockholders believe their investment already has been injured by the protracted antitrust case. James C. Boyd, a Lexington industrial engineering consultant and a First Security stockholder says, "The bank stock hasn't fluctuated $2 since the merger, which isn't desirable in a growth period like this." He figures that, in the absence of antitrust action, stockholders "could have anticipated a 25 percent growth in value."

EXECUTIVES HAVE LEFT

There are other worries, such as personnel to man the two re-created banks. Two of Security Trust's four former vice presidents are no longer with the merged bank and other key officials also have left. There's also the problem of public confidence lost because of charges of illegality in the merger. Mr. Miles predicted that Security Trust would suffer most from the publicity because, after several years of merged operation, "the smaller bank has lost its separate identity."

It's well to remember, of course, that Mr. Miles was arguing his case against

unmerging before the court and thus likely was tempted to paint his troubles in the darkest possible hue. But, exaggerated or not, Mr. Miles' apprehensions cause other bankers to watch Lexington closely. Says one attorney for another bank now under antitrust attack: "If they ever order us to split up, they better tell us exactly how it's supposed to be done, because it beats me."

None of the mergers under attack now is more than 4 years old. But there is nothing to prevent the Justice Department from challenging older combinations. Assets so long comingled might prove even more difficult to unscramble. Among mergers of the 1950's: One which created the present Chase Manhattan Bank and another forming First National City Bank, both giant New York banks.

The CHAIRMAN. The Chair says that the leadoff witness tomorrow will be the representative of the great American Bankers Association, the president of that association. Then we will have some other witnesses here.

We stand in recess until 10 o'clock tomorrow morning.

(Whereupon, at 11:55 a.m., the subcommittee recessed, to reconvene at 10 a.m. Thursday, May 20, 1965.)

AMEND THE BANK MERGER ACT OF 1960

THURSDAY, MAY 20, 1965

U.S. SENATE,
COMMITTEE ON BANKING AND CURRENCY,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS,
Washington, D.C.

The subcommittee met at 10:05 a.m., in room 5302, New Senate Office Building, Senator A. Willis Robertson (chairman of the subcommittee) presiding.

Present: Senators Robertson, Sparkman, Douglas, Proxmire, and Thurmond.

The CHAIRMAN. The committee will please come to order.

It gives me pleasure to present to the committee the Honorable Reno Odlin, who is chairman of the board of the Puget Sound National Bank, Tacoma, Wash., and he is the president of the great American Bankers Association.

We are pleased to hear from you.

You may proceed.

STATEMENT OF RENO ODLIN ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION; ACCOMPANIED BY CHARLES R. McNEILL, DIRECTOR, WASHINGTON OFFICE

Mr. ODLIN. Thank you, sir.

If I might, Senator, I would like to make an opening statement and then attempt to answer any questions you and your colleagues may have.

I am accompanied by Mr. Charles R. McNeill, the director of the Washington office of the American Bankers Association.

For the record, my name is Reno Odlin. I am president of the American Bankers Association and chairman of the board of the Puget Sound National Bank, Tacoma, Wash. I am appearing here today on behalf of the association in support of S. 1698, a bill designed to eliminate the confusion and chaos surrounding the whole question of bank mergers.

Before making specific comments on the bill under consideration, it might be well to take a brief look at some of the economic factors that have prompted mergers in all lines of business and commerce since World War II.

One of the prime reasons for mergers is the lack of qualified successor management. Many industries were not hiring new employees during the 1930's because they didn't need them. They didn't hire them during the war years because they couldn't get them. As a result, some companies lacked depth in management and when it came time for top executives to retire there were not enough capable and

experienced men coming along behind them. Many smaller companies solved this problem through mergers with larger firms that had larger pools of talent. This same pattern held true in banking and prompted many mergers.

The second major reason for bank mergers was directly related to the dynamic performance of the economy. In the past two decades, the economy, measured in terms of output of goods and services, generally referred to as the gross national product, has grown by 192 percent, reaching an annual rate of $623 billion at the end of 1964. But while GNP was rising by 192 percent, commercial and industrial loans were increasing by 480 percent, rising to more than $55 billion in mid-1964. Domestic private investment during the same 20-year period rose by 750 percent to nearly $88 billion at the end of 1964. Over the two decades, expenditures for plant and equipment jumped by 470 percent.

The rapid increase in economic activity caused a quickened rate of growth in the size of many corporations which in turn put pressure on banks for more diversified services. As credit demands of corporations grew, some smaller banks began to feel the restrictions on their lending limits and decided that mergers would enable them to increase their lending capacities.

The third element encouraging mergers has been the efforts of commercial banks to meet the financial needs of the American public during a period of expansion and rapidly changing economic and population patterns. These developments have resulted in a huge demand for a growing variety of bank services, particularly those oriented toward consumers which involve high-volume operations.

For example, some mergers have occurred as a result of two small or medium-sized banks desiring to obtain the modern and expensive electronic data processing equipment that has spread so rapidly in banking in the past decade.

Finally, some bank mergers have occurred in recent years as a result of the efforts of the bank regulatory agencies to prevent a bank suspension. These so-called shotgun mergers can do much to preserve the stability and strength of the banking system. But it should be obvious that the management of any bank approached by the regulatory authorities with a request that it absorb a weak bank in the community would be very reluctant to do so if the merger might be subsequently challenged in the courts on the grounds of competition alone.

Those of us who make our living in banking, as well as experienced observers of the banking scene, know full well that competition in banking—and between banks and other financial institutions—is stronger today than at any time in the past.

It is my own judgment that, on balance, the many bank mergers in the postwar period, rather than diminishing competition, have in fact led to increased competition, both among banks and between banks and other types of financial institutions.

BACKGROUND OF THE BANK MERGER ACT

In 1950, section 7 of the Clayton Act was amended to prohibit mergers through asset acquisition as well as stock acquisition in any line of commerce in any section of the country where the result would

tend to reduce competition substantially. The amendment, however, covered only corporations under the jurisdiction of the Federal Trade Commission. Banks have never been under the jurisdiction of the Federal Trade Commission.

During the 1950's, as the number of bank mergers increased, the Justice Department sought legislation to subject banks to the new section 7 of the Clayton Act. The Justice Department wanted the change, I should assume, because it recognized that it lacked authority under section 7 of the Clayton Act, as amended. Moreover, until recently, it was almost universally believed that bank mergers would not be subject to section 1 of the Sherman Act.

Congress flatly rejected these proposals of the Justice Department to make section 7 of the Clayton Act applicable to bank mergers. But, at the same time, Congress saw the need for legislation to establish clear and uniform standards governing bank mergers, and it saw the need to specify which agency of Government should have the final authority over bank mergers—the Justice Department or the three Federal bank supervisory authorities.

The Bank Merger Act of 1960 was intended to answer both requirements. The act gave the final authority over bank mergers to the three bank supervisory agencies—the Federal Reserve System for State member banks, the Federal Deposit Insurance Corporation for insured nonmember banks, and the Comptroller of the Currency for national banks. Under the legislation the banking agency having jurisdiction is required to request a report on the competitive aspects of a merger under consideration from the Justice Department. The agency having jurisdiction is also required to request reports on competitive factors from the other two banking agencies. The competitive factor is then weighed along with such factors as the financial history and condition of the banks involved, the adequacy of their capital structures, the general character of the banks' management, and the convenience and needs of the community to be served. The agencies are required to reject any merger application if, after giving full consideration to all such factors, they do not find the transaction to be in the public interest.

In passing the Bank Merger Act, Congress decided that the public interest is best served by subjecting bank mergers to a balanced test of competition and protection of sound banking rather than to the single test of competition under the antitrust standards.

I don't think the intent of Congress could have been stated more clearly than it was at the time the Bank Merger Act was passed. Senator Fulbright, Democrat of Arkansas, who had previously served as chairman of the Senate Banking and Currency Committee, said,

> As it passed the Senate, S. 1062 (the Bank Merger Act) expressed the view of the Senate, for the third time, that bank mergers should be regulated by the Federal banking agencies on the basis of banking factors and competitive factors, with no single factor being controlling. S. 1062 was a clear statement, for the third time, of the Senate's view that the provisions of section 7 of the Clayton Act should not apply to bank mergers.

The Senator went on to point out that—

> the amendments to S. 1062 made by the House do not change this aspect of the bill. The House has agreed with the Senate that bank mergers should be controlled by the Federal banking agencies on the basis of both banking factors and competitive factors, and that section 7 of the Clayton Act should continue to be inapplicable to bank mergers.

The intent of the bill was also stated by the majority leader of the Senate, Lyndon B. Johnson, who inserted the following statement into the record just before the bill passed, and I quote President Johnson:

This bill establishes uniform and clear standards, including both banking and competitive factors, for the consideration of proposed bank mergers. It eliminates a number of gaps in the statutory framework, which now permit many bank mergers to occur with no review by any Federal agency. It provides for a thorough review by the appropriate Federal bank supervisory agency, under these comprehensive standards, and with the benefit of any information which may be supplied by the Department of Justice in the report required from them, of the bank mergers by asset acquisition and other means which are now and will continue to be exempt from the antimerger provisions of section 7 of the Clayton Antitrust Act.

The majority leader at that time added:

The repeated improvements (in this bill) * * * show the real merits, the real benefits of the legislative process at its best.

It seems to us the intent of Congress in passing the Bank Merger Act was very clear. Yet, in June of 1963, following 2 years of litigation, the Supreme Court, in ruling on a merger of two banks in Philadelphia which had been approved by the Comptroller of the Currency, said the merger violated section 7 of the Clayton Act.

Justice Harlan, who disagreed with the majority, said:

I suspect that no one will be more surprised than the Government to find that the Clayton Act carried the day for its case in court * * *. The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy * * *. This frustration of a manifest congressional design is, in my view, a most unwarranted intrusion upon the legislative domain.

Subsequently, the Supreme Court ruled that two banks in Lexington, Ky., which had merged in accordance with the provisions of the Bank Merger Act were in violation of the Sherman Act. Then, in March 1965, a Federal district court in New York ruled that the Manufacturers Trust Co. and the Hanover Bank violated both the Clayton Act and the Sherman Act when they merged in 1961, after they had received the approval of the Federal Reserve Board.

On the basis of these rulings the Department of Justice could now challenge all of the more than 2,000 bank mergers which have been consummated since the Clayton Act was amended in 1950.

THE PURPOSE OF S. 1698

Obviously, there is a clear need for the legislation that is now before this committee. The ground rules governing bank mergers must be reaffirmed and the dark clouds of confusion must be removed from the numerous bank mergers that have been consummated in good faith under the law of the land.

S. 1698 would serve both of these purposes. It would place bank mergers virtually in the same category as mergers in other highly regulated industries.

There is no question that the banking industry is one of the most tightly regulated industries in the Nation. Before a bank is even chartered, the banking agencies must be assured that such a bank, if chartered, would meet the needs and convenience of the community. The agencies must also determine that the bank, if chartered, will have a reasonable chance of succeeding.

A bank is not comparable to other businesses, and it is viewed differently by the public at large. When a bank fails, repercussions are felt throughout the community. Last year there were 13,501 business failures. This figure is about average. Yet, when eight banks with total deposits amounting to eight one-thousandths of 1 percent of all bank deposits failed in 1964, it made headlines and led to a congressional investigation, with which, incidentally, we have indicated our full cooperation.

In short, a single bank failure is cause for concern because of the human and economic problems it creates for the community. That is why entry into the banking business is controlled.

Once a charter is granted to a bank, the bank becomes subject to very strict regulations which prescribe the amount a bank may lend to an individual or a corporation, how much it can pay in interest to attract deposits, how much it must maintain in cash reserves, and a host of other limitations. In fact, regulations pervade the whole spectrum of bank operations. Through periodic examinations, bank supervisory agencies make sure that the regulations are observed.

By using these tools—regulation and examination—bank supervisory authorities can control competition in banking on a continuing basis to make sure the system is sound and the public interest is protected.

Mr. Chairman, the American Bankers Association contends that the intimate working knowledge of banking gained by the supervisors in their daily association with banks is essential in regulating competition in banking. It is also our contention that this know-how is basic in considering the merits of bank mergers. Therefore, we are in full support of S. 1698 which would place bank mergers under the jurisdiction of the three Federal bank supervisory agencies.

The Justice Department would still play an advisory role, in that the banking agency having jurisdiction would have to request a report on the competitive aspects of any merger under consideration. The banking agency would also have to request reports on competitive factors from the other two banking agencies.

But the first provision of S. 1698 would give the Federal bank supervisory agencies the final authority over bank mergers, which was what Congress, we think, intended when it passed the Bank Merger Act in 1960. It would exempt bank mergers from the provisions of the Sherman Act and section 7 of the Clayton Act.

THE QUESTION OF "UNMERGING" BANKS

The second provision of S. 1698 is designed to prevent the courts from breaking up mergers that were consummated under appropriate regulatory authority. Five mergers are now in the courts. Over 2,000 others could be challenged by the Department of Justice under the Supreme Court's interpretation of the antitrust laws.

"Unmerging" a bank after the two banks have operated as a single unit is nightmarish even in the abstract. The relationship between a depositor or borrower and his bank is based on mutual confidence and trust. In many cases, corporations and individuals select a particular bank because the bank offers the exact combination of services needed. This is particularly true when trust services are involved.

If a bank were to unmerge, internal working efficiency would be shattered. The customer, who has not been given much consideration in this whole question, would then be faced with the decision of which one of the two "unmerged" banks he should patronize. If the relationship is broken, the customer may decide that he does not want to get his business mixed up in the unscrambling process and select neither of the two unmerged banks but a different bank, and, in all probability, a larger one.

If this pattern of shifting to a larger bank in lieu of the unmerged banks prevailed, what effect would this have on competition? Instead of increasing competition, it is likely that unmerging of banks would lead to an increase in concentration in banking. This cannot be in the public interest.

Few observers believe the Justice Department would attempt to break up the 2,000-odd bank mergers that have taken place since 1950. It would certainly create chaos in the financial system. But here again the question is one of equity and fairplay. Should the Justice Department question some mergers and not others when they were approved by the same Federal authorities under the same law? After all, we boast loud and long about being a government of laws and not of men.

The American Bankers Association strongly urges that all bank mergers which have been consummated, after receiving the approval of appropriate regulatory authorities, including those now being challenged in courts, be permitted to stand.

CONCLUSION

The Executive Council of the American Bankers Association, the ruling body of the association, with members representing all divisions, sections, and committees of the ABA and all States in the Union, unanimously supports S. 1698. I request permission to insert the minutes of the record of those discussions in these hearings and also their resolution.

(The minutes and resolution referred to follow:)

Excerpt From the Report of the Federal Legislative Committee, the American Bankers Association, to the ABA's Executive Council on S. 1698, April 13, 1965

"We come now to something which is paramount, not only to the interest of banking, but it is based upon the great principles upon which this great country was founded.

"I refer to the bill by Senator A. Willis Robertson, S. 1698, which would restore to the Federal bank supervisory agencies complete jurisdiction over bank mergers, and prevent the Justice Department from challenging past bank mergers which were approved by the bank supervisory authorities.

"In 1960 a bank merger bill was enacted by the Congress and it was the clear congressional intent that control over bank mergers be vested in banking agencies.

"The Department of Justice did not so construe the bill. In the *Philadelphia* case, the Supreme Court held that the Department of Justice had the right and indeed the duty to object to bank mergers as violations of the Sherman Act and the Clayton Act.

"There isn't a single line in the bank merger bill of 1960 that suggests such an untoward result. There isn't a single line in the hearings before the Senate committee that suggests such a result and yet, the Supreme Court has spoken.

"Gentlemen, this is a bill that demands your complete enthusiastic, undivided support. * * *"

(The foregoing, together with other legislative recommendations, was unanimously approved by the ABA Executive Council, the association's governing

body between annual conventions. The 150-member council represents all 50 States and all ABA divisions, sections, and committees.)

THE AMERICAN BANKERS ASSOCIATION, RESOLUTION

Whereas it was the expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies—the agencies equipped with the special knowledge necessary to regulate intelligently the American banking system;

Whereas these uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, relegated the regulatory authorities to advisory roles: Be it

Resolved, That this association endorses and supports bill S. 1698 introduced in the U.S. Senate on April 5, 1965, restoring the original intent of Congress as contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960 or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency.

Mr. ODLIN. Many State bankers associations have taken similar action and indications are that others will do the same. Mr. Chairman, these actions by the ABA, which represents 98 percent of the Nation's commercial banks, plus the support coming from State bankers associations, demonstrate without doubt that the banking industry favors this legislation.

In our judgment, the present state of confusion in the field of bank mergers must be eliminated so that bankers can get back to their main task—meeting fully and effectively the financial needs of the American economy.

S. 1698 can clarify the whole situation and I urge its prompt passage.

Thank you very much.

The CHAIRMAN. I wish to commend you warmly upon your statement. That was very clear, concise, and unusually well documented.

In the early part of your statement you referred to one reason for mergers in recent years—to prevent suspension of banks that a regulatory agency found were in unsafe condition.

I had this impressed upon me last week. I got a confidential report from the chairman of the FDIC. I won't mention the name of the bank. I won't even mention the State. He said this bank, as I recall, was the only bank in the small community. It had a great opportunity for service. Their examiners found that the bank, with capitalization of about $500,000, had in its portfolio, either through crookedness or inefficiency or both, securities in the sum of $375,000 that were all forgeries. The bank was insolvent.

What should he do? He went to another bank, and he said, "We can close this bank, and we can pay off all the depositors. There is nobody in there with over $10,000. And then we can collect whatever assets it has got and reimburse ourselves. The stockholders will then lose all their investment and the community will have no bank. The stockholders are willing for you to take over their bank and pay them whatever little equity it amounts to."

Nobody knew—and nobody knows today—that that bank was merged for anything except a good sound reason, and the little bank

now is operating, and on a sound basis and the community has the credit facilities it needs.

And then again you talked about the nightmare if merged banks would have to be divided. Well, it's almost as bad as dividing that baby between the two women in the days of Solomon.

Take the classic example that was mentioned here yesterday of the largest merger that has been declared illegal—Manufacturers Hanover Trust. They were both State banks, weren't they?

Mr. ODLIN. Yes.

The CHAIRMAN. I assume when they merged and became Manufacturers Hanover Trust they had to get a new charter, didn't they? Each one gave up the old State charters?

Mr. ODLIN. As I remember Senator, they used one of the existing charters. I don't remember which one.

The CHAIRMAN. I suppose they used one of the old charters. They gave up one. They couldn't have two charters.

Mr. ODLIN. That's right.

The CHAIRMAN. Now they are a State bank. They will have to be split down the middle.

I was in New York not too long ago, and somebody pointed out a building to me. I said, "What is that big office building over there?"

He said, "That is one of the office buildings of Manufacturers Hanover Trust."

I said, "How much space does it occupy?"

He said, "All of it."

I said, "All of that building?"

"Yes."

"Well," I said, "how many workers?"

"Well, they only have 4,000 there."

I said, "That's as many as in my hometown, 4,000."

Then I said, "How many employees does the bank have all together?"

He said, "10,000."

If you are going to split this great bank in half, in two, can that district judge charter a bank, a State bank? Did you ever hear of a Federal judge chartering a State bank?

Mr. ODLIN. No, they have no authority to grant charters, of course.

The CHAIRMAN. Well, of course, they haven't. We only have a very tenuous control of State banks anyway. We say, "If you let us slip the Federal noose around your neck a little bit by guaranteeing the deposits in your bank, then, if you'll behave, we won't pull it too tight." And that's the way we get control of State banks, and that is a little thin, don't you see? But we are operating on that system.

Well, I won't go into the details of "You take this deposit, and I'll take that deposit," and the depositor says, "Oh, no, I want it to be in a strong bank. You put me over here with Hanover. That deals just with corporations. I want one that is interested in the consumer credit, don't you see? I'm not going over to Hanover."

The court puts another depositor into Manufacturers. He says, "You don't know the real operation of a big corporation. We want something like the transaction that was handled in the new organization of Chrysler." Incidentally, Manufacturers Hanover supported the reorganization of Chrysler when they brought Consolidation Coal into Chrysler, with George Humphrey and $300 or $400 million of capital.

What happened to Chrysler? It was just as if they had been put on a launching boom down there at Cape Kennedy or Cape Canaveral or whatever you prefer to call it. It has just been going on right up in the air. But it took big money to get that corporation reorganized and a valid competitor with companies like General Motors.

That is just one detail of what a big bank could do that a little bank couldn't do. And Chrysler has put out more cars, given more work, and they have paid more income tax to the Government.

The Chair recognizes our senior member from Alabama, Mr. Sparkman.

Senator SPARKMAN. Mr. Chairman, I believe I have no questions to ask. I thought it was a very clear and able statement.

I may say in that connection that I was one of those back in 1958, 1959, and 1960 who introduced legislation to make section 7 of the Clayton Act applicable to bank mergers. My position was not accepted by the Congress.

Even when the Bank Merger Act was being debated in the Senate, I tried to get a provision through giving the Justice Department the right to check into these various mergers and to have a stronger hand in them. Again my position was not accepted.

But there was a provision written in whereby the Justice Department would be asked for an advisory opinion.

And that Bank Merger Act became the law. And it was under that law that these mergers have been made, as pointed out. And even though the law did not conform to what I thought it ought to be at the time, it became the expression of the will of the Congress and became the law of the land.

And I agree with the chairman as to the impracticality of breaking these mergers open after they have been running for 2, 3, or 4 years.

I plan, therefore, to support the legislation.

The CHAIRMAN. Thank, you sir.

The Senator from Illinois.

Senator DOUGLAS. No questions.

The CHAIRMAN. Thank you very much.

Mr. ODLIN. Senator, could I add a word on that question of these "shotgun" things?

The CHAIRMAN. Yes indeed.

Mr. ODLIN. This impresses me. It is one of the most important problems that this legislation is intended to cure.

Let us assume a sound, good, solid bank was approached by the officials of the FDIC and asked to take over a bank that for one reason or another had gotten into difficulty on a basis that would be very beneficial to the community, would give the FDIC an opportunity to clean up an unsound situation without having it go through a suspension, and would be good for everybody concerned and a good deal less expensive than suspension.

The bank that was asked to take this other bank over might very well say, "Well, we want to do anything we can for the good of the community. But with the legal uncertainty surrounding bank mergers staring us in the face, we're not going to do something that might subsequently put our institution and our shareholders in jeopardy through a court action that might come up 2 or 3 years from now."

And I think it puts handicaps on the FDIC that shouldn't be there.

The CHAIRMAN. There can be no doubt about that.

Mr. ODLIN. Yes, sir.

The CHAIRMAN. I know of several instances where I thought the larger bank had acted in a very unselfish way. They were assuming the possibilities of loss. They were taking over an institution that some people at least knew was badly crippled. They didn't know how long they might have to carry it before they would get any profit.

But if after they do it they have got to face a disemboweling suit, they would say, "Thank you very much. Get somebody else."

Mr. ODLIN. I think so.

The CHAIRMAN. Thank you very much.

The next witness is speaking from a wide experience as former head of the group that represents the largest number of banks in the United States—that is, the State banks. He is a man who has made us proud of our support of the dual banking system.

He is a distinguished former bank superintendent of the Empire State, the money capital of the world, with more banks and bigger banks than any other State. Well, I don't say "more banks," but more bigger banks and more money than any State.

I was privileged to hear him not too many years ago deliver a very splendid speech at the historic city of Williamsburg at a meeting of his association that I was privileged to attend.

The speech that was made on that occasion by the next witness was inserted in the Congressional Record, and it is so good that I would like to insert it in our record, if there is no objection. (See p. 93.)

The CHAIRMAN. The Chair will now be glad to present to the committee the next witness, Hon. G. Russell Clark, chairman of the board, Bank of North America, and, as I say, former superintendent of banks of the State of New York.

Mr. Clark, will you come forward, please? Just state your name and present occupation and previous occupation so that the record will be fully explicit as to who is testifying.

STATEMENT OF G. RUSSELL CLARK, CHAIRMAN OF THE BOARD, BANK OF NORTH AMERICA, AND FORMER SUPERINTENDENT OF BANKS, STATE OF NEW YORK

Mr. CLARK. Mr. Chairman, gentlemen of the subcommittee of the Senate Banking and Currency Committee, my name is G. Russell Clark. I am chairman of the board of the Bank of North America, formerly superintendent of banks, State of New York.

I appreciate very much the opportunity to testify in favor of the Robertson bill, S. 1698, relating to amendments of the Bank Merger Act of 1960.

Over the years prior to 1960, bank supervisors, as well as bankers generally, became increasingly perplexed as the result of deadening effects of Government restrictions on the activities of banks which were trying to play their part as service institutions in the economic development of our country. Banking, generally speaking, had lagged seriously behind other forms of corporate activity in the great economic advances that had taken place, particularly since World War II. The work done in connection with the Financial Institutions Act of 1957, and other similar bills, furnished the background for the

avenue of approach to a clarification of matters affecting our financial areas of activity which were so helpful in framing the Bank Merger Act of 1960.

It appears proper to me, in order to be logical in the approach to the proposal presently at hand, to review in retrospect some of the actions taken under the provisions of the Bank Merger Act.

In 1960, we in the banking field felt that it was increasingly difficult to keep abreast of the rapidly changing, and at times contrary, winds of supervisory opinion on a multitude of banking matters. We were concerned with supervisory regulations and opinions in many areas, including chartering, branching, interest rates, examinations, et cetera, but one of the areas most befogged was that of bank mergers.

It was the opinion of practicing bankers that the Bank Merger Act would be the cornerstone on which, at long last, positive direction would be given to bank mergers. With its seven tests for applicability, it was felt that at least we had more anchor and less sail.

Those seven tests in my State were: Capitalization, liquidity, asset classifications, the premium paid, the management class and succession, its financial history, and the major item of the needs and convenience of the public.

As we understood the act, authority over mergers was vested in one of three Federal agencies—that is, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency. We were aware of the fact that in merger proposals State member banks as well as insured State nonmember banks would be required to pass over two hurdles—that is, either the Banking Department of the State and the Federal Reserve Board in one case, and the Banking Department of the State and the Federal Deposit Insurance Corporation in the case of nonmember banks, while national banks were required to clear only one hurdle—that is the Comptroller of the Currency's Office.

There were differences of opinion at that time regarding the posture of the Justice Department in bank mergers, and it was finally resolved by requiring the Justice Department to submit an advisory opinion on the competitive factors of each merger, as distinguished from the banking factors, to the bank regulatory agency having primary approval jurisdiction. Advisory opinions were also required from each of the other two bank regulatory agencies not charged with final approval.

In certain quarters it was felt that the Justice Department should be placed in a commanding position in bank merger considerations, but it is noteworthy that the then Chairman of the Federal Deposit Insurance Corporation, in his testimony in the preceding legislative session, said:

> No examination or review by the Department of Justice, or other agency or commission, outside the bank supervisory field, of the facts of a merger transaction, can be an adequate substitute for the background, knowledge and current information which presently reposes in the supervisors.

The thoroughness of the action of Congress in its consideration of S. 1062 in the spring of 1960 indicated a crystallized opinion on the question of which agencies of Government should be charged with the responsibility for final approval of bank mergers.

Senator Fulbright said, in presenting the bill in the absence of Senator Robertson:

> As it passed the Senate, S. 1062 expressed the view of the Senate, for the third time, that bank mergers should be regulated by the Federal banking agencies on the basis of banking factors and competitive factors and with no single factor being in itself controlling. S. 1062 was a clear statement, for the third time, of the Senate's view that the provisions of section 7 of the Clayton Act should not apply to bank mergers. The amendments to S. 1062 made by the House do not change this aspect of the bill. The House has agreed with the Senate that bank mergers should be controlled by the Federal banking agencies on the basis of both banking factors and competitive factors, and that section 7 of the Clayton Act should continue to be inapplicable to bank mergers.

Further, on the day that it passed the Senate, the then Senator Lyndon B. Johnson, of Texas, speaking on the same bill, said:

> This bill establishes uniform and clear standards, including both banking and competitive factors, for the consideration of proposed bank mergers. It eliminates a number of gaps in the statutory framework, which now permits many bank mergers to occur with no review by any Federal agency. It provides for a thorough review by the appropriate Federal bank supervisory agency, under these comprehensive standards, and with the benefit of any information which may be supplied by the Department of Justice in the report required from them, of the bank mergers by asset acquisitions and other means which are now and will continue to be exempt from the antimerger provisions of section 7 of the Clayton Antitrust Act.

I should also like to quote at this point a further statement by the then Senator Johnson in which he said:

> This long process—

The five years it took to get the Congress to agree on a bill—

> tries the temper of those who must suffer under it. But in my judgment the repeated improvements in S. 1062 in the course of this slow process show the real merits, the real benefits, of the legislative process at its best.
>
> Again I want to express my congratulations to Senator Robertson and Senator Fulbright and Senator Capehart and the other members of the Banking and Currency Committee for the persistence and the thoroughness and the statesmanship which they have displayed in carrying this matter through to a satisfactory conclusion.

It was at this point, generally speaking, that bankers, perhaps overoptimistically, secure in the belief that further controls were unwarranted and unnecessary, had confidence that banking would continue to be closely regulated under reasonable controls and subject to the primary supervision of the applicable government bank supervisory agencies, both State and Federal.

Not too many months after the passage of the Bank Merger Act, however, clouds appeared on the horizon in connection with the *Philadelphia National Bank* case. Without attempting here to go into the merits of that case, a very significant attitude was expressed in the U.S. district court by a representative of the Justice Department which indicated a viewpoint on the posture of banking in the financial community that was most disconcerting and alarming to the average banker. The judge in that case was compelled to record in his opinion the following words:

> The court was not impressed with the attempts of the Government to show that banking is of minor importance in the life of a community generally and of almost absolute unimportance in the business life of the community. The Government, in its attempt to establish this contention by testimony that no single particular individual industrial organization has ever entered a particular territory, because of the presence or absence of banking facilities, has ignored the

industrial history of the United States. Should one ever speculate as to whether any industry would enter a community without banking facilities, the answer would be completely obvious. Historically, banking facilities have preceded industry in every community.

Incidentally, the district court—Chief Judge Clary—ruled for the banks and against the Department of Justice both as to the Sherman Act and the Clayton Act.

As one who has been trained in the belief that banks are and have been by practice and tradition cast in the role of service institutions, it came as somewhat of a shock to learn that such high officers of Government evaluate our services at such a minimal level. It gave rise to the thought that, if such Federal authority ever reaches a point where it supersedes, ignores, or submerges the authority of State supervisors, this will mark the point of no return and will signal the demise of the dual banking system.

The second step taken by the courts would seem to contra the view of the Congress as expressed in the Bank Merger Act. This was reached on June 17, 1963, when a decision was rendered by the U.S. Supreme Court in the same *Philadelphia National Bank* case. This had the apparent practical effect of removing conclusive judgments on bank mergers from the duly authorized supervisory agencies to the realm of legal decision.

It seemed at that point that we now became subject to a government of men and not a government of laws.

This decision, by five members of the Court, with two dissenters and one Justice agreeing in part with the dissent, was classified by the distinguished Senator from Virginia, Senator Robertson, as "one of the most incredible cases of judicial legislation which the Court has handed down." He was also "shocked both at the result and at the Court's casual disregard for congressional intent and purpose."

Justice Harlan, saying that section 7 of the Clayton Act did not apply to a bank merger, observed with respect to the Bank Merger Act of 1960:

> This enactment turns out to be an exorbitant waste of congressional time and energy.

To the mind of the average banker it meant that, regardless of previous action by appropriate supervisory agencies, merger proposals involving banks would be subject to Federal antitrust laws and henceforth that mergers approved by appropriate bank supervisory agencies would not be immune from challenge under such laws.

At this point the Justice Department had taken antitrust action in only one other case involving a commercial bank—a case which was subsequently settled in the course of litigation.

Not long thereafter the Justice Department Antitrust Division announced a clearance procedure under which, as we understood it, a bank could consult with that Department on a contemplated merger prior to submission to the applicable supervisory authority. It appeared that one would need a keen sense of perception to determine the exact moment when the "advisory" nature of the consultation turned into a "warning" that, if the decision reached by the supervisory agency did not agree with that of the Antitrust Division, then the "bones of a lawsuit would rattle in the closet."

It is hardly necessary to state here that the element of time involved in consideration of a merger is of utmost importance to the participating banks, their depositors, and their stockholders, as well as to the public generally. In the hands of delaying tactics and inexperience in the banking field, this type of delay could conceivably cause results that some day in some merger would be fraught with danger.

A good example of delaying tactics would be the occurrences involving banks in New Haven and in Hammond, Ind.

In effect, this places the three bank supervisory agencies in a posture where they have only the initial veto power and any final approval so extended can under present practices be vitiated by a nonbank governmental agency. It has led to a new banking technique which could be labeled "bank unscrambling."

It was generally believed that Congress delegated to the attention of the Justice Department only the competitive factor involved in mergers, and then only in an advisory capacity, which has now developed into the primary and dominating factor, as opposed to the banking factors now judicially relegated to a place of secondary importance.

It is against this background that I would now express a few remarks on the Hanover Manufacturers merger in New York City, which took place during my superintendency of banks for the State of New York and which I approved on May 23, 1961.

I became superintendent of banks upon the invitation of Governor Rockefeller with one of the main objectives of our efforts to be a revision of the banking law of the State of New York where the supervisor has control over not only commercial banks, savings banks, savings and loan associations, but a host of other institutions conducting activities in the financial field.

Outmoded laws had contributed to many misunderstandings and it was essential that an orderly process should be developed to benefit the economic interests of the State as well as to safeguard the public interest.

It was under this charge of duty that chapter 237 of the laws of 1960, reenacted by chapter 146 of the laws of 1961, set forth the criteria to be considered by the superintendent in determining whether to approve a proposed merger of corporate banking organizations. They are:

"(i) (*a*) to insure the safe and sound conduct of such business;

"(*b*) to conserve their assets;

"(*c*) to prevent hoarding of money;

"(*d*) to eliminate unsound and destructive competition among such banking organizations;

"(*e*) to maintain public confidence in such business; and

"(*f*) to protect the public interest and the interests of depositors, creditors, shareholders, and stockholders."

"(ii) Whether the effect of the merger for which approval is sought shall be either—

"(*a*) to expand the size or extent of the resulting institution beyond limits consistent with adequate and sound banking and the preservation thereof, or

"(*b*) to result in a concentration of assets 'beyond limits consistent with effective competition.'"

"(iii) Whether such merger may result in such a lessening of competition—

"(*a*) as to be injurious to the interest of the public, or
"(*b*) tend toward monopoly."

"(iv) Primarily, the public interest and the needs and convenience thereof."

Competition under these rules and in banking practice is local, national, and international. There were at least 20 other commercial banks and 25 foreign bank agencies in New York City competing with other large U.S. banks and Manufacturers Hanover also competed internationally with a great number of foreign banks.

Hanover had two London offices. It had a representative in Paris and Beirut. The Manufacturers did not have branch offices but had representatives in Paris, London, Rome, Frankfurt, and Tokyo.

Competition has since been reactivated and stimulated by another law that was passed during my superintendency which gave the foreign bank agencies operating in New York the right to convert to bank branches and thereby compete on a level basis with our domestic banks.

The reason for that law, as I recall—and it is 4 years ago and I may have an airhole here and there in my memory—was that our banks, not only in New York but in other metropolitan centers, were anxious to establish branches or do business in other foreign countries. It became a question of reciprocity.

And in order to live up—speaking of the New York interest—to our concept that we were the money center of the world, we felt we should not build an iron wall around the business of our State but we should welcome competition at home as well as to extend our competitive practices to other centers of the world.

The Banking Department of New York State has had unique supervisory experience in banking dating from 1851. In the opinion of competent bank supervisors, the standards of the department are as high as those of any other agency exercising bank supervisory powers. Truly in the banking hub of the world, its familiarity with trade and competitive practices and patterns in the banking industry is not limited to a local market exclusively, but by very nature of its geographical locale it is in the center of the whirling waters of international trade.

It is well known that the competition in the New York money market among the great variety of financial corporations, both domestic and foreign, is as keen as in any other center. It is for this reason, among others, that the supervisor must exercise a judgment that is as fair as humanly possible, balanced between banking factors and competitive factors, encouraging the degree of competition that will inure to the public interest, needs, and convenience.

In the matter of branching, for instance, the department must have a definite address at which the branch will be located, evidence of a satisfactory lease or option, a minimum distance from competing institutions, and other like regulations to insure the orderly and progressive development of our banking community.

It is through strict interpretations of our State laws and banking regulations that we maintain a sound and conservative banking system.

It is in the field of mergers, however, that I believe the record of the New York State Banking Department exhibits that degree of pro-

fessional competence which comes through the long experience of its staff members.

The department considers and evaluates against the backdrop of its experience the extent of competitive activity a proposed merger would eliminate, the resulting relative size and the potential market area of the resulting institution, and, more importantly, the effects upon the public interest of any substantial reduction in the amount and quality of the remaining competition.

In the consideration of the Manufacturers Hanover merger which involved an exhaustive analysis by highly competent banking supervisory people in many areas of banking activity that led to the final approval of this merger, the standards previously referred to relating to safe and sound conduct of such business and maintenance of public confidence offered no obstacle.

Indeed, the two banks involved had long and honorable tenures: in the case of the Hanover running back to 1873, and in the case of Manufacturers to 1905. Their assets had shown steady growth and both enjoyed a high degree of public confidence. There was no reason to believe that these factors would change upon the completion of the merger.

In view of the recent legislation passed by the Congress designed to protect the interest of stockholders, it is interesting to note that the owners of the banks involved—namely, the stockholders—voted overwhelmingly in favor of the merger; 86.7 percent in the case of the Manufacturers and 90.4 percent in the case of Hanover. The Hanover Bank was a $2 billion institution holding 4.6 percent of all commercial bank assests in the city. After the merger, the combined banks resulted in an institution which was New York City's third largest bank, holding only 13.5 percent of the commercial bank resources in the city.

Parenthetically it may be noted here that as of the close of business on December 31, 1964, the relative position of the merged bank in the top 10 banks in New York City is unchanged. It still remains in third place and is only 60 percent of the size of the second bank in the city in total resources. At the same date the two largest banks in the city had combined resources that equaled those of the next four largest banks of the city combined, including the merged bank. Further, the two largest banks increased resources by 47 percent as against an increase of 42 percent for the group of the next four banks in the four and a half years from June 1960 to December 1964.

Total assets and total number of branches, while most impressive, are not under all circumstances the most meaningful measures of the competitive power of a bank or the competitive impact of a bank merger. In a metropolitan center, recognition must be given to the branch locations of all competing institutions, including savings banks and savings and loan associations. At the time of the merger there were 3 to 13 offices of competing commercial banks—excluding Manufacturers—within 2 blocks of each of 7 branches of Hanover Bank; the other 4 branches had like competition. In Manhattan alone, more than 250 offices of about 30 competing commercial banks offered competition. There was no indication of concentration or domination in this area, and certainly no lessening of competition so as to be injurious to the interests of the public.

Neither bank involved in this merger was suffering any injury or impairment of its sound financial condition by the competitive

practices of other financial institutions. Their business had been safely and soundly conducted for years. The Hanover Bank was known throughout the trade to be a "wholesale" bank while Manufacturers was known to be primarily a "retail" bank with some "wholesale" business. It was evident that the combined institution would offer the benefits of the specialized field in which each institution had previously engaged and would complement each other and accordingly service the field of banking and trust operations on a much broader scale than each could service acting individually. With the growth of U.S. industry it was natural to assume that larger lines of credit would be needed from banks generally, and inasmuch as the resources of the combined institutions would enable the merged banks to service large national corporations, in competition with larger banks, that seemed most desirable.

The average large corporate borrower of the two banks tripled in size since the year 1947, a growth rate that was 10 times that of the Manufacturers and 20 times that of the Hanover Bank.

In this area the loan ratio of Manufacturers Trust was lower than the average for other large New York city banks.

In this merger there was no question of protection of the interests of depositors as services would continue to be offered on substantially similar terms. It was to be noted that Hanover did not, except for employees, offer special checking accounts to the public and did not provide for savings accounts or certain types of consumer loans. To this extent the merger represented expansion of facilities offered to the public.

Considerable additional data on the merger could be offered here, but in the interests of brevity I shall lodge with the counsel for the committee a copy of my decision in this merger.

The CHAIRMAN. That may be inserted in the record following the testimony of the witness.

Mr. CLARK. I should like here to record the following summary and decision on the application submitted by the banks:

Data submitted by the applicants, and this Department's independent study, as reviewed in the foregoing sections of this statement, lead to these conclusions:

1. The considerations set forth in section 10 of the banking law (and incorporated by reference in section 601-b), including the technical banking factors of capitalization, liquidity, asset classifications, the premium proposed to be paid to the stockholders of Hanover, management classification and succession, and financial history, are either favorable, not adverse, or not precisely applicable.

2. The proposed merger would not expand the size or extent of the resulting institution beyond limits consistent with adequate or sound banking and the preservation thereof.

3. The proposed merger would not result in a concentration of assets beyond limits consistent with effective competition.

4. The proposed merger would not result in such a lessening of competition as to be injurious to the interests of the public, nor in such a lessening of competition as to tend toward monopoly.

5. The public interest would not be injured by the merger, and the needs and convenience of the public would be served to some extent thereby.

Accordingly, I approve the proposed merger of the Hanover Bank into Manufacturers Trust Co., and recommend to the banking board that it approve the operation and maintenance by Manufacturers Hanover Trust Co. of the presently authorized domestic and foreign offices of the Hanover Bank, New York, N.Y., May 23, 1961.

In the latest judicial opinion in this case, the U.S. District Court for the Southern District of New York concludes in part that there is

a "reasonable probability" that this merger "may" substantially lessen competition or tend to create a monopoly in commercial banking in the New York metropolitan area, et cetera. I understand that plans must be drawn under this decision so as to reconstitute the two banks as they were before the date of the merger. As previously said, this would appear to call for "bank unscrambling."

The substantial difficulties which must be overcome in effecting this divestiture cannot, in my opinion, be underestimated. The effect of this step on depositors, borrowers, stockholders, and the general public cannot be projected with any degree of certainty. Among the questions which are bound to arise in this connection are:

1. Which bank receives the deposit accounts opened since merger date?

In this connection, what happens to the total deposits while divestment is taking place?

2. How to divide the loans made to borrowers since that date.

In this connection what happens to borrowers while divestment is taking place?

3. The handling of excess loan lines where the borrower's needs exceed the statutory limit, or the operating limit, of one of the original banks.

What disposition can be properly made of the following accounts—

4. Personal trust services:
   (*a*) Voluntary and court trusts.
   (*b*) Agency and custody accounts.
   (*c*) Pension fund trusteeships.
   (*d*) Profit-sharing funds.
   (*e*) Investment advisory accounts.

5. Corporate trust services:
   (*a*) Trustee for security issues.

And on that point, in recent years banks doing business outside of New York have taken more than one-half of new corporate bond offerings and municipal revenue issues.
   (*b*) Stock transfer agencies.
   (*c*) Registrar accounts.
   (*d*) Dividend disbursing agency accounts.
   (*e*) Bond and coupon paying agencies.

6. Accounts with correspondent banks:

This would involve participation in loans originated by either of the merged banks or participated in or originated by either of the merged banks or participated in or originated by the merged bank.

It also involves correspondents' safekeeping accounts. It also involves, particularly in the case of the Manufacturers, acting as trustee for retirement funds for banks which, as I recall, exceeded over 700 accounts at the time of the merger.

7. Accounts with foreign banks and agencies.

8. Activities in municipal and Government securities.

9. Employees pension funds—profit-sharing plans. (Handling of retirements, insurance, etc.).

As I recall, the group insurance for employees in one bank provided for death benefits that were quite a degree higher than that in the other bank.

I don't know what would happen to the morale of the employees in the bank with the lower amount of coverage when perhaps it had

to take its former position as far as their life insurance coverage was concerned.

10. Automation equipment and expense involved in returning to previous posture.

I do not believe that anyone can accurately estimate the cost of installing an automation system involving the furnishing of all customers of the bank with new checkbooks bearing newly encoded bank account numbers, requiring replacement of every check that is outstanding to make your system 100-percent efficient, when the cost of the equipment alone runs into the substantial six figures.

It is hard to estimate for anyone, even the most expert in that field, what the dollar amount of cost would be—plus all the annoyance and resistance to change that would ensue on the part of the customer.

11. Leases, contracts, new branch applications, and perhaps new offices that may be under construction.

12. Officers and employees acquired since merger dates.

I happen to know of one man who gave up a very good senior position to come with the merged bank. I don't know how he would feel if the banks were split asunder, whether he would want to continue with one bank, or whether he might think he had made a bad choice on a factor that he hadn't even thought of.

13. Inasmuch as the demolition of the former home office of Hanover Bank is completed, the unscrambling is further complicated by main office relocation problems.

And as you mentioned, Senator Robertson, during the presentation by Mr. Odlin the question arose as to how would the reconstituted bank get a charter. As far as I am aware, there is nothing presently in the law which would compel the superintendent of banks of the State of New York to grant a charter by order of a court. I think that this could be a real problem.

Each of these items could also be applied to all large bank mergers since the Celler-Kefauver amendment in 1950.

This legislation (S. 1698) in my opinion will have the beneficial effect of returning to the proper banking supervisory agencies the jurisdiction which is sorely needed to clarify the existing confusion not only in the minds of bankers but also in the minds of an alert and inquiring public. Avoidance of controversy has long been a hallmark of the banking industry. We have a need for better understanding between bankers and their supervisory agencies, as well as between the agencies themselves. Acting in concert, we can jointly make further contributions to clear away the uncertainty that unnecessarily impedes our services to the economic growth of our country.

Thank you very much, sir.

The CHAIRMAN. You have given us a very interesting sidelight into the importance of the dual banking system and how that system is safeguarded against the creation of combinations and mergers that would substantially lessen competition or constitute a monopoly.

Now let us take a quick look at a complaint that was heard here yesterday by one opponent of the pending bill who is alleged to have said that the bill amounts to shooting the policeman on the corner.

Senator DOUGLAS. Who was that, may I ask?

The CHAIRMAN. Mr. Wright Patman.

I wasn't going to mention his name, but I have to answer.

Senator DOUGLAS. I thought we should know the source of the statement.

The CHAIRMAN. Mr. Clark, I know you knew all these bank commissioners because they elected you. And, after all, they don't usually vote for somebody they never heard of. Did you ever know of a State bank commissioner who favored monopoly against the interests of the people of the State?

Mr. CLARK. No, sir.

The CHAIRMAN. Did you ever know of a member of the Federal Reserve Board who favored monopoly against the people of the Nation?

Mr. CLARK. No, sir.

The CHAIRMAN. Did you ever know of a member of FDIC who favored monopoly against the interests of the people?

Mr. CLARK. Same answer, sir.

The CHAIRMAN. Under the provisions of the present bank merger act—which the courts have, as you pointed out, clearly misconstrued, I think—isn't it true that, before two or more State banks can merge, it must have the approval of the State banking agency?

Mr. CLARK. Yes, sir, that is true.

The CHAIRMAN. We heard yesterday there are twice as many State banks, relatively speaking, as there are national banks.

Mr. CLARK. That is my recollection.

The CHAIRMAN. In New York, tell us the factors that you have to consider for the protection of the public before you as a banking commissioner would approve any merger of State banks. What are they?

Mr. CLARK. Generally speaking, sir, those are the State requirements I have read.

The CHAIRMAN. Would you repeat them for us? I think it is important to know what you considered when you approved the merger of the Manufacturers Hanover and when you approved the merger of the Chase Manhattan. You approved both of them, didn't you?

Mr. CLARK. No. Chase Manhattan was before my time, sir.

The CHAIRMAN. All right. You had a hand in framing this law in New York?

Mr. CLARK. Yes, sir. I did.

The CHAIRMAN. What did you put in this law for the protection of the public? Just read it. It is in your statement, but just read it again there.

Mr. CLARK. I would, if I may, like to put it in my own words without referring to the statement.

The CHAIRMAN. I am sure that will be better.

Mr. CLARK. I think a good example, sir, of the benefits of the merger to the public would be in this case where the Hanover Bank did not offer consumer lending services to the public, with one small exception. This to me was one of the fine things, the good things, in this merger.

It did not offer savings accounts except to employees. This again was a service to the public.

They did not have, with a few minor exceptions, special checking accounts, which is one of the main items of use of bank checks today. Again, expanded services to the public.

The Hanover Bank had 11 branches in areas of the city where these services could have been utilized by the public and where the Man-

ufacturers Trust, generally speaking, also offered in their 120-odd branches these same services.

The location of the banks' offices has a great deal to do with a supervisory decision. The staffing of the offices also enters into his decision. The quality of the competition, the type of the competing institutions, these are typical of the factors that enter into the supervisor's preliminary thinking, and in most cases his ultimate decision.

The CHAIRMAN. Now I just want to summarize very briefly what you have embodied into law in your great State. You are the policeman for the corner for the protection of the public in bank mergers. Before you will approve a merger, you have got to consider these criteria:

> To insure the safe and sound conduct of such business;
>
> To conserve their assets;
>
> To prevent hoarding of money;
>
> To eliminate unsound and destructive competition among such banking organizations;
>
> To maintain public confidence in such business; and
>
> To protect the public interest and the interests of depositors, creditors, shareholders, and stockholders.

Whether the effect of the merger for which approval is sought shall be either—

> to expand the size or extent of the resulting institution beyond limits consistent with adequate and sound banking and the preservation thereof; or
>
> to result in a concentration of assets "beyond limits consistent with effective competition."

Whether such merger may result in such a lessening of competition as to be injurious to the interest of the public, or tend toward monopoly.

Primarily, the public interest and the needs and convenience thereof.

Mr. CLARK. That is right, sir.

The CHAIRMAN. And you approved the merger of Manufacturers Hanover?

Mr. CLARK. Yes, sir; I did.

The CHAIRMAN. And you tell us that after 4 years or more of merger you are fully confirmed in the fact that, instead of decreasing competition, other banks went ahead of them in competition?

Mr. CLARK. That is right, sir.

The CHAIRMAN. In New York City.

Now, all right. Then you say, on the basis of that, you do not think, if you were now the policeman on the corner to protect the public in New York, that my bill would shoot you?

Mr. CLARK. No, sir; I do not think it would.

The CHAIRMAN. All right. So, before any member banks can merge that are State banks, first the State banking agency must certify as to the necessity of it?

Mr. CLARK. That is right, sir.

The CHAIRMAN. The appropriateness of it?

Mr. CLARK. In New York State, when the superintendent approves a merger, it is approved in practice conditional upon the approval of the Federal Deposit Insurance Corporation or the Federal Reserve

Board, depending on whether the resulting bank would be a member or nonmember bank.

The CHAIRMAN. That is true. But suppose you disapprove it. That is where it dies?

Mr. CLARK. That is where it dies.

The CHAIRMAN. All right. You don't know of any State commissioner who favors monopoly? So the friend of antimonopoly has a man in the driver's seat on the first go-around?

Mr. CLARK. Yes.

The CHAIRMAN. And if it is not proper, he kills it right there?

Mr. CLARK. Yes, sir.

The CHAIRMAN. But his approval does not make it effective? Where does it go? If it is a member bank, who has to take it up from there?

Mr. CLARK. The Federal Reserve Board.

The CHAIRMAN. If it is a nonmember State bank, who takes it up from there?

Mr. CLARK. FDIC.

The CHAIRMAN. And you say you have never heard of anybody in either of those agencies who favors monopoly?

Mr. CLARK. No, sir. Quite the contrary.

The CHAIRMAN. Are they all men trained in the science of banking and considering it all the time?

Mr. CLARK. They have been trained.

The CHAIRMAN. Therefore, you come before us and say on the basis of your practical experience, on the basis of the present safeguards, you see no good and sufficient reason why this Congress should permit another branch of the Government, which is supposed to be enforcing criminal laws and not regulating banking, to have the veto and life and death final sentence over any merger of banking institutions? You don't see any sense for that?

Mr. CLARK. I do not see the justification for that posture by that particular agency.

I should also like to say, Mr. Chairman, that preceding the Manufacturers Hanover merger—I have forgotten how many months before if not a year or so before—I turned down at the department door a merger applied for by one of the largest banks in New York with a bank in the suburban areas of the city which was at that point in control of 51 percent of the banking assets of that suburban trade area.

And the reason, as I recall, that I gave it a negative reply was that the suburban bank, and this has been subsequently borne out by the record, would advance its interest far up into the Hudson Valley, and I believe today if you were to consult the heads of that bank they would agree that it was the best thing that ever happened for that particular bank, because it has expanded so greatly to the north.

But at that time the merger with a New York city bank was in my opinion contrary to the best interests of the public, and was definitely a tendency toward monopoly.

The CHAIRMAN. The Senator from Illinois.

Senator DOUGLAS. Mr. Clark, what was the period of your service as superintendent of banking in New York?

Mr. CLARK. Two and a half years, sir.

Senator DOUGLAS. Beginning when?

Mr. CLARK. I was in Governor Rockefeller's first cabinet—January 1959.

Senator DOUGLAS. Until?

Mr. CLARK. June 1961.

Senator DOUGLAS. Did Mr. Oren Root also serve as superintendent of banking in New York?

Mr. CLARK. As my successor, sir.

Senator DOUGLAS. In the last few years, as the chairman indicated, the former Chase National Bank and the Manhattan Bank merged.

Mr. CLARK. That I believe, sir, was back in about 1955 or 1956. Somewhere around 1956. I have forgotten the exact date.

Senator DOUGLAS. And Chase National Bank, which had been almost the first national bank in the country, gave up its national charter and became a State bank?

Mr. CLARK. Yes, sir. That is my recollection.

Senator DOUGLAS. And this was approved by the State superintendent of banks?

Mr. CLARK. Yes, sir.

Senator DOUGLAS. And confirmed by the authorities here. Now, in the old days there used to be a National City Bank and a First National Bank.

Mr. CLARK. Yes, sir.

Senator DOUGLAS. Have those merged?

Mr. CLARK. Yes, sir. First National Bank merged into the——

Senator DOUGLAS. The George F. Baker Bank?

Mr. CLARK. It was known as the George F. Baker Bank. At that time I was head of the New York clearinghouse.

Senator DOUGLAS. Did they give up their national charters or are they still national banks?

Mr. CLARK. The First National City Bank continues to operate under the national charter of the National City, as I recall.

Senator DOUGLAS. Now, the Manufacturers Hanover is the third bank. What is the fourth bank in size in New York?

Mr. CLARK. I think it is the Chemical. I think today it is the Chemical Bank.

Senator DOUGLAS. Chemical Bank?

Mr. CLARK. Chemical.

Senator DOUGLAS. Have they merged with any bank?

Mr. CLARK. Yes, sir. They have merged with the—they have taken in the New York Trust Co.

Senator DOUGLAS. New York Trust?

Mr. CLARK. And several other smaller banks in the suburban area of New York.

Senator DOUGLAS. Westchester or Long Island?

Mr. CLARK. In Long Island. And I believe they were in recent weeks turned down on an application to take over a bank in Yonkers, one of the suburban areas to the north of the metropolitan district.

Senator DOUGLAS. That would be Westchester?

Mr. CLARK. Yes, sir. That would be in Westchester County.

Senator DOUGLAS. Is the Chemical Bank now a State bank?

Mr. CLARK. Yes, sir. It has been a State bank for many, many years.

Senator DOUGLAS. Was New York Trust a State bank?

Mr. CLARK. Yes, sir.

Senator Douglas. They got the consent of the State superintendent of banking?

Mr. CLARK. That is right, sir.

Senator DOUGLAS. When did that happen?

Mr. CLARK. That happened during my tenure.

Senator DOUGLAS. So you approved both the Chemical and New York Trust merger——

Mr. CLARK. That is right, sir.

Senator DOUGLAS (continuing). And also the Manufacturers Hanover merger?

Mr. CLARK. That is right, sir.

Senator DOUGLAS. Now, you say the Manufacturers Hanover Bank has 13.5 percent of bank deposits in New York City?

Mr. CLARK. Banking assets. Bank assets I believe I said, sir.

Senator DOUGLAS. Bank assets. All right. What percentage does Chase Manhattan have?

Mr. CLARK. Roughly I believe it is about 21 percent.

Senator DOUGLAS. It was 21 percent 8 years ago. Has that increased since then? Total assets are a little short of $50 billion?

Mr. CLARK. In 1960, if I may put some guideposts up, sir——

Senator DOUGLAS. Yes.

Mr. CLARK. In 1960 the Chase Manhattan Bank had resources of $8,087 million. At the close of business on December 31, 1964, it had total assets of $11,949 million.

Senator DOUGLAS. What are the total assets of New York City?

Mr. CLARK. New York City? Of all the banks?

Senator DOUGLAS. Well, include the five boroughs. We won't merely take Manhattan. Take the five boroughs.

Mr. CLARK. Well, I do not have a figure for the five boroughs, but if I may project, the assets of all the State banks, trust companies, and national banks in the city of New York at the close of business——

Senator DOUGLAS. Is that Manhattan only or is that the city including the five boroughs?

Mr. CLARK. That would include Queens. It would include Manhattan. It would include Richmond. It would not go into Nassau County, nor would it go into Westchester. It would include Brooklyn.

Senator DOUGLAS. Would it include the Bronx?

Mr. CLARK. It would include the Bronx.

Senator DOUGLAS. That's what I want to find out—if it includes the five boroughs that comprise New York City.

Mr. CLARK. Total of $55,371 million.

Senator DOUGLAS. And Chase Manhattan has $11 billion?

Mr. CLARK. $11.9 billion.

Senator DOUGLAS. Well, that is about 21 percent. That is correct. Now, how about National City—First National?

Mr. CLARK. They had at the same date, December 31, 1964, $10.9 billion.

Senator DOUGLAS. That would be just short of 20 percent?

Mr. CLARK. Yes, sir.

Senator DOUGLAS. Manufacturers Hanover is 13.5.

What does the merger of Chemical with New York Trust and the other banks show?

Mr. CLARK. Chemical shows a total asset of $6.1 billion.

Senator DOUGLAS. That would be 11 percent roughly.

Mr. CLARK. Yes, sir.
Senator DOUGLAS. Is that correct?
Mr. CLARK. That is right.
Senator DOUGLAS. Now, the four biggest banks then have 64.5 percent of bank assets in the city of New York.
Mr. CLARK. And Morgan Guaranty has $5.7 billion as the fifth bank.
Senator DOUGLAS. Thank you.
Well, in 1958 the four largest banks in New York City had 60 percent of the bank assets, so it has increased from 60 to 64.5 percent. So there has been a growth in concentration, control over assets of New York banks as a result of these mergers.
Was Chemical one of the big four in 1958?
Mr. CLARK. My recollection would say, Senator, they were not one of the big four.
Senator DOUGLAS. Would First National have been one of the big four?
Mr. CLARK. First National City; yes, sir.
Senator DOUGLAS. So what happened was that when National City and First National merged that those had previously been two of the big four?
Mr. CLARK. National City would have been. The First National Bank was outside of the first four.
Senator DOUGLAS. Oh. Would Manhattan have been one of the first four in 1958?
Mr. CLARK. Bank of Manhattan Co.?
Senator DOUGLAS. The Bank of Manhattan Co. The bank which merged with Chase.
Mr. CLARK. That is the Bank of Manhattan Co. That was not, my recollection says, in the first four.
Senator DOUGLAS. You see, what some of us are afraid of is a tendency of mergers to increase the degree of concentration of control. It is a matter of very real concern to us.
We appreciate the difficulties of unscrambling previous mergers.
You were not here yesterday, but I cited examples of Great Britain and Canada where a concentration of banking facilities has helped or has fostered concentration of industrial control. Big banks like to lend to big companies.
And I think there is no doubt that a concentration of banking has fostered concentration of industry in both of these countries. This has created many, many difficulties, has led to cartelization, which tends to restrict output, consequently employment, and which puts great strain on the prices and wages in the noncartelized industries.
So these are great matters of public policy.
I want to thank you for your very courteous testimony.
Mr. CLARK. Senator, knowing of your great interest in small business, one of the figures that I recollect in the Manufacturers Hanover would be that, if you could say that loans of $100,000, at the line of $100,000 or less, could be considered as loans to small business, my recollection is that slightly over 90 percent of Manufacturers Trust loans were in that category.
Senator DOUGLAS. The test is not the percentage of the number of loans but the percentage of the total amount of the loans. You as a statistician should well recognize that fact. You can always bring

in large numbers of small loans and build the figure up. But the test is on the distribution of amounts loaned. Do you have those figures?

Mr. CLARK. No, sir; I do not. Not in my memory.

Senator DOUGLAS. I didn't think you would have them.

Mr. CLARK. I quoted the number of loans.

Senator DOUGLAS. Well, with the computers, it ought not to be too difficult to compile those.

Mr. CLARK. Thank you, sir.

The CHAIRMAN. As far as the concentration of lending power in New York is concerned, I can recall that one of the Democrat issues in 1896 was that McKinley had to borrow $87 million from J. Pierpont Morgan to pay the bills of our Government. We had run out of money. Now we don't have to borrow from any New York bank.

Senator DOUGLAS. It was Grover Cleveland who had to do that borrowing, at very high interest rates.

The CHAIRMAN. I knew they had to borrow it.

Senator DOUGLAS. He chose to borrow it under the influence of William C. Whitney.

The CHAIRMAN. It just showed, though, the trend and what has been happening under the Federal Reserve Board, the 12 regional banks, and the dual banking system.

One of the big four, and I believe bigger than Manufacturers Hanover, is the Morgan Guaranty. Isn't that right?

Mr. CLARK. No, sir. That is smaller in asset size than Manufacturers Hanover.

The CHAIRMAN. I thought they must be mighty big, because recently in New York a New York friend said, "That is the old Morgan Guaranty Building. They recently spent $18 million improving it, and now they are going to tear it down and build a new one." I thought they must be awfully big if they could afford to spend so much for their building.

Well, anyway, that merger was effected before you became Commissioner?

Mr. CLARK. Morgan Guaranty was in my time.

The CHAIRMAN. In your time?

Mr. CLARK. Yes, sir.

The CHAIRMAN. The essence of your testimony is that no one bank has a monopoly on money in New York or anywhere else?

Mr. CLARK. Mr. Chairman, I can assure you from the standpoint of the chairman of the board of the 11th largest bank in New York City, or smallest bank, whichever end of the pipe you look through, that competition is as keen as anything that I would want to face up to.

The CHAIRMAN. On yesterday I made a rough guess at the banking assets of New York City, and I put it at $50 billion. I was pleased that I was under the figure but not too far off; $55.3 billion, you say?

Mr. CLARK. That is right, sir.

The CHAIRMAN. The Senator from Wisconsin.

Senator PROXMIRE. Mr. Clark, were you here when Mr. Odlin, the head of the American Bankers Association, testified?

Mr. CLARK. Yes. I came in during his testimony.

Senator PROXMIRE. He said in the course of his testimony, and I quote, "While GNP was rising"—this is in the last two decades since World War II roughly—"by 192 percent, commercial and industrial loans were increasing by 480 percent, rising to more than $55 billion in mid-1964."

You say, "Banking, generally speaking, had lagged seriously behind other forms of corporate activity in the great economic advances that had taken place, particularly since World War II."

It seems that you two gentlemen are in contradiction. Mr. Odlin points out—and I think his statistics are correct—the enormous increase in loans, an increase of 480 percent, and you say you lagged, weren't doing very well in 1960.

The difference between 1960 and 1964 is something, but it is not sufficient to obviate that point.

Mr. CLARK. I think the point I made, Senator, was that the growth of industrial concerns and corporations, has been much greater than the rate of growth of banks. And, therefore, in the scheme of things, banks must enlarge either through acquisition of new deposits or by merger to obtain sufficient resources to meet the demands, the credit demands, of these tremendously large corporations.

Senator PROXMIRE. I was a very lowly associate of J. P. Morgan & Co. back in 1940——

Senator DOUGLAS. A junior partner.

Senator PROXMIRE. Very junior; $25 a week. That's how junior I was.

Mr. CLARK. I go back, before that. I made less.

Senator PROXMIRE. But, as I recall, at that time a big bank was a billion dollar bank, not in New York perhaps, but this was true in the rest of the country, true in Chicago and elsewhere.

Now you are talking about banks with—How many billion dollars does the Bank of America have in California?

Mr. CLARK. I think it is approximately $15 billion for the Bank of America——

Senator PROXMIRE. And it has grown threefold, fourfold, fivefold in the last 25 years.

Mr. CLARK. Yes.

Senator PROXMIRE. That is great growth.

Mr. CLARK. That is right, sir.

Senator PROXMIRE. Certainly there are banks that can service even the corporations as huge as General Motors and American Telephone & Telegraph. Isn't that true?

Mr. CLARK. That is right, sir. Of course, the legal loan limits apply, and that might be termed as being the "large umbrella." And in most banks—I speak now principally of my own, as an example, where the legal lending limit of my bank is approximately $2¾ million, just as a matter of credit safety, only in specially creditworthy cases, will we loan more than a million dollars.

Now, I think that same maxim applies in the largest banks. It will depend on the amount of the credit requested and the character and efficiency of the company that requests it. But when you talk about Chyrsler, General Motors, Du Pont—when they come to the market for their loans, they are substantial.

And I can recall following a speech in Iowa just a year or so ago having the president of one of the largest firms of its kind in Iowa say, when I asked him what he did at harvest time to get the credit needs of his company met, that he couldn't possibly go to any bank in his State, that he had to go to Chicago, to St. Louis, to New York, or to Philadelphia to fill his needs.

Senator PROXMIRE. You see, this is the difficulty we are up against. We have a kind of a vicious circle here. What happens is that business

gets big and there is perhaps an increase in the economic concentration in this country. The Congress periodically has been alarmed by it. They were in the 1930's; they were again in the 1950's.

Big business means that you have to have big banks. And big banks, as the Senator from Illinois brought out yesterday, tend to service primarily big business. And while you can point out there are many loans to small business, it is far more convenient for banks if they are big banks to service big business.

Therefore, you have some discrimination against small business, and you have the economic concentration cycle aggravated. It continues.

This is what concerns us, and it concerns me, and I am very anxious to be sure that if we pass this bill it will provide genuine safeguards against unjustified mergers in view of the great difficulty of entry into the banking business as compared with other businesses.

If we are going to make it possible to combine, to continue to make entry difficult, it is going to be hard for the small businessman to have the kind of facilities available that he ought to have.

Mr. CLARK. It has been my experience in over 40 years in banking in the city of New York that today, more than ever before, a small businessman with a halfway decent credit rating can get his loan requirements at any bank in the city.

My bank particularly made its reputation over the years, which now exceed 40, through its loans to small business, starting as an industrial bank and continuing the same policy down through the years to the present time.

Senator PROXMIRE. I think that perhaps this is true, and I want to make sure that we do all we can to continue it this way. But we are concerned about what may happen in the future.

You say over the years, prior to 1960, bank supervisors as well as bankers generally became increasingly perplexed as the result of deadening effects of Government restrictions. Well, now, during that period there was no or very little restriction on the part of the Federal Government against bank mergers, and there were some very large bank mergers, so certainly the merger problem wasn't one of the problems before 1960. Is that correct?

Mr. CLARK. Well the merger problem was really rolling along at about 1960. But one of the things that I can recall——

Senator PROXMIRE. Mergers were rolling along?

Mr. CLARK. Yes. There were a number of mergers in that period. And I could say parenthetically too, Senator, that there hasn't been any merger that has taken place without the consent of the stockholders of the bank taken over. Frequently their line of judgment depends on the numerals that follow the dollar sign of the offering bank.

Senator PROXMIRE. Well, I think that is certainly logical. You expect that. Two institutions won't merge unless there is a profitable future for them.

Mr. CLARK. Correct, sir. And then too it was my experience as superintendent in New York to observe that three out of four merger applications that passed over my desk and through our department were predicated on lack of succession.

Senator PROXMIRE. Now, what troubles me more than anything else is this, and perhaps you can help clarify it because you are cer-

tainly a very competent witness: Yesterday the Chairman of the Federal Reserve Board, Mr. Martin, indicated that there were situations in which, in spite of the strongest adverse finding of the Department of Justice that the merger was reducing competition, he would still vote in favor and his Board would probably follow him and vote in favor of permitting the merger.

It seems to me that that put the issue pretty squarely.

Under the Clayton Act, under section 7 of the Clayton Act, as I understand it, a merger would not be allowed if it substantially lessened competition.

Mr. CLARK. That's right.

Senator PROXMIRE. Mr. Martin obviously feels that you should permit this kind of a merger. I am just wondering if banking should be exempt from the principles of the antitrust laws that mergers should be allowed under these circumstances, in view of the fact that the very regulations which have been documented so well by you and other witnesses are designed to protect depositors and others from abuses of too vigorous a competitive system.

In other words, banking is better insulated than almost any industry from the devastation of competition. And for this reason it seems to me that the effect of a rigorous antitrust action is very unlikely to work hardship on depositors or on the general public——

Mr. CLARK. Sir, I can recall——

Senator PROXMIRE (continuing). In other words, the regulations, it seems to me, strengthen the case of the court rather than the case of those who would take it out from under the Clayton Act.

Mr. CLARK. There is no doubt in my mind, sir, that in every merger there is a slight element of lessening of competition. I just don't believe that you can avoid that posture. But on abuses——

Senator PROXMIRE. Let me just say what Mr. Martin said was not the slight element. I understand that case as certainly justifiable. He said where they made the strongest adverse recommendation. And under this bill I think he is right; I think he would be following the law, because it would provide that there are six other criteria.

Mr. CLARK. That is right. There could be other factors involved in the merger which would overcome or be more improtant from the standpoint of a sound and efficient banking system that would cause the supervisor to say that the merger shall take place.

I had experience during my tenure with a bank that I am sure would have fallen on troublesome days with trouble to the general public had we not taken steps to permit a merger. Poor management—these things—can cause ripples in the banking pond that extend from one side of the country to the other.

It may be of interest to know that there was a recent occurrence on the west coast which might to the casual observer seem to be far remote from New York. Yet in my own bank we had people come in who were concerned, where their deposit accounts exceeded $10,000. They knew they were insured up to $10,000. And because of all the publicity that ensued in the papers as a result of that occurrence, they were a little bit perturbed and thought, to play safe, they would remove the excess over $10,000 and put it in another bank where they would be covered by the $10,000 insurance of the FDIC.

So that, to me, was the most recent proof that an unfavorable ripple 3,000 miles away can reach our shores on the eastern seaboard.

Senator PROXMIRE. Don't the regulations themselves, the fact that we give the examiners and others the unusual power—that the States do and the Federal Government does—to protect depositors, tend to mitigate the plea that you have to have mergers in addition to this to protect the public in banking practices?

After all, if you have an examining system that is worth the name, if these fellows are going to earn their money, they certainly ought to be able to protect the public, especially in view of the difficulty of access, without having to have these mergers, so many of them, and without having to have a special protection and exemption from the antitrust laws.

Mr. CLARK. Well, Senator, if, as an example, a man in a small community starts his career off, perhaps as you did in a well-known institution at Broad and Wall, and as I did in a well-known institution at 77 Cedar Street, but he is in a small bank in a small community, and starts off as the office boy, and as the years go by he gradually gets to be assistant cashier, cashier, and then president, during the course of those years he accumulates the stock of his bank from various people who either pass away and hand it on, or at least he buys it.

Then, suddenly, he comes to an age when he is starting to think of what will happen to him and his affairs when he passes on. And he has, say, 75, 80, or 85 percent of his worldly goods tied up in his bank stock.

A fellow comes over the hill, and he makes a good offer to him for his bank stock, and the owner sees that he can then protect his loved ones. He is given the right of a pension that he never anticipated before, an insurance coverage for his dependents and other emoluments. And he remains in the job and still has his spot in the community where he is part of the warp and woof of the whole development of the community.

I simply ask the most fair-minded man: What would you do?

I think——

Senator PROXMIRE. I think you can make a strong case. But you could say this for any businessman in any line of business, in the steel business or any other business. And they are governed by the antitrust laws.

Mr. CLARK. And so that——

Senator PROXMIRE. Why should we make a special exemption, put the banker in a particular class where he is able to merge even though the effect is to lessen competition, and not permit the person in the steel industry or who manufactures any other commodity to do it?

Mr. CLARK. As I remember, sir, and I am not a lawyer—perhaps I would be smarter if I had a counsel with me; but I answer just from 40 years of experience in the banking field—it is my recollection that the Sherman and Clayton Acts did not arise primarily from abuses in the banking field but rather in the fields of oil, steel, and aluminum and tabacco, maybe one or two others. And now we seem to be drawn by suction into this particular area where we now find ourselves slightly handcuffed.

Senator PROXMIRE. Let me ask one more question. What effect would this bill have on judicial review of mergers? What would be the recourse of a person who was aggrieved by a merger, either a customer or a competitor or anyone else?

Mr. CLARK. In New York State, under laws passed during my time also, a stockholder who does not agree with the merger is entitled to get, on appriasal, his cash value of his shares if he so desires.

Senator PROXMIRE. What I am getting at is that there is now judicial review, and it goes to the court, and you have some kind of fair, objective determination. But if we pass this bill, will it mean that a customer who feels that he no longer can get access to the banks would have no way in which he could bring suit?

Mr. CLARK. It is my understanding, sir, that the Justice Department in its advisory capacity, and it is always of great service to the public, certainly would hear of complaints as against a particular merger which it certainly would bring in turn to the attention of the bank supervisory agency having primary jurisdiction over the agency.

Senator PROXMIRE. Then you would not have judicial review, and the three agencies involved would be in a position to, as Mr. Martin said, simply reject the strongest adverse recommendation of the Department of Justice.

Mr. CLARK. Yes, sir, but only after those agencies had considered all aspects of the proposed merger and on the basis of that consideration concluded that the merger would be in the public interest.

Senator PROXMIRE. Thank you very much.

The CHAIRMAN. Mr. Clark, what is the present branch banking law of New York State?

Mr. CLARK. The present branch banking law of New York State provides that a bank may not branch outside of its district. Under the terms of the Omnibus Act of 1960, reestablished in 1961, which I mentioned in my testimony, and enacted during my tenure of office, the New York City banks could extend their branching facilities into the neighboring counties of Nassau and Westchester. This applied to any city, the law provided, with over 1 million population, which meant that Buffalo, the second largest city, which had not reached 1 million population but some day, if it did, banks could then branch into their adjoining counties.

There are bills in the New York Legislature right at this moment which would ask for the further extension of branching by banks in the State, and it is a question as to whether the New York Legislature, in its wisdom, will grant those privileges which have been not only promulgated by the commercial banks but also requested in separate bills by the savings banks.

That, sir, is the present law applying to commercial banks as I recall it.

The CHAIRMAN. What delayed action a whole year on my Financial Institutions Act of 1957 was the complaint of some people that it had a provision that savings and loans should not have greater branch banking facilities than the State provided for commercial banks. That affected just nine States, but that was enough to hold it up for a whole year.

But now let's come to the State of Pennsylvania. What is their branch banking situation?

Mr. CLARK. I would like to be qualified, sir, to answer that in detail, but with Mr. Brumbaugh in the room, who I believe is going to testify, and knows intimately as a former commissioner of the State of Pennsylvania——

The CHAIRMAN. Just tell us, Is it rather liberal or is it restricted?

Mr. CLARK. I would say that it is restrictive. My memory is that there are certain limitations that involve and surround the banks doing business in Philadelphia and which put restrictions on their movements out into the suburban areas.

But, as I say, sir, I would not claim to be an expert at this moment on Pennsylvania banking law, but that is my understanding.

The CHAIRMAN. Now let's move into the great State of Illinois. What is the law there?

Mr. CLARK. No branching privileges in the State of Illinois. As a matter of fact, I had the privilege of addressing the Illinois Bankers Association convention last year on the virtues, if we may say so, of branch banking.

The CHAIRMAN. They have had very few mergers there because if they merge they have got to be located in one place or another. They can't have two locations. The mergers we have had there have been few, I reckon.

For many years we had a 25-mile limit in Virginia. They recently made some minor changes.

Now, let's move out to California. Isn't it true that it was through unrestricted branch banking that the Bank of America became the largest bank in the United States?

Mr. CLARK. Yes, sir; I think that is a good reason for its growth. Also the fact that the Bank of America is commonly known in banking circles to cater to the small depositor and borrower, from its very beginning.

The CHAIRMAN. We are going to have two powerful men testifying tomorrow. One of them comes from California. They both complained bitterly of the size of the Bank of America. They haven't done anything at all out there about limiting what made the Bank of America big, and that is branch banking.

But they are going to be very bitter against my bill tomorrow because they want to limit mergers somewhere else. It won't bother too much out there.

Senator DOUGLAS. Now, Mr. Chairman, aren't you unfair to these witnesses? They haven't testified yet.

The CHAIRMAN. Well——

Senator DOUGLAS. I don't think we can predict——

The CHAIRMAN. They have told me——

Senator DOUGLAS. I don't know who you are referring to.

The CHAIRMAN. The witnesses I am speaking about have visited me in my office, and they have told me they want to appear in opposition to the bill, and they have told me how strongly they feel.

Senator DOUGLAS. They can be in opposition and not be bitter.

The CHAIRMAN. And I just want to make sure that they have plenty of time to express their views.

Senator DOUGLAS. That is very gracious, and I hope they will be given that. But I do protest that their attitude is condemned in advance as "bitter." I think we should wait until after the testimony is in.

The CHAIRMAN. Here is a State expert on all the States about branch banking. They wouldn't know about all this. I have asked him about New York and about Chicago in Illinois and then I go out to California. That's all.

Senator DOUGLAS. I think your questioning was perfectly legitimate and perfectly to the point. I was merely saying that I don't think

you should condemn Mr. DuBois and Mr. Harding in advance as being inevitably bitter in their attitude toward your bill.

We can oppose your bill. I am not certain that I do. I think there are good features to it.

Mr. CLARK. I recall——

Senator DOUGLAS. Possibly the banks should not be unscrambled. Possibly they can't be.

We don't take an attitude of complete opposition. But we shouldn't think that because people differ with us they are inevitably going to be "bitter." Let them have a chance.

The CHAIRMAN. Perhaps I shouldn't say "bitter." Perhaps I should say "strong" opposition. Mr. DuBois and Mr. Harding and I have known each other long enough not to let an adverb or an adjective worry us.

Mr. CLARK. Mr. Chairman, I understood that yesterday—I was not present yesterday but I understood—some question was raised in this chamber about the Bank of America competing in the Metropolitian New York area. I can assure you that the competition that the Bank of America gives to the New York institutions is real, genuine, and tough. They have as many representatives working in New York as some of the New York banks have working in California.

The CHAIRMAN. I have heard that; yes.

Senator THURMOND. Mr. Chairman, I have another meeting. Could I ask three or four questions before you close?

The CHAIRMAN. Is there any objection?

Senator DOUGLAS. No.

Senator PROXMIRE. No.

The CHAIRMAN. Go right ahead, Senator.

Senator THURMOND. Thank you.

Mr. Clark, I presume there is no question in your mind that the decisions in the *Philadelphia National Bank* case and the *First National Bank and Trust Company of Lexington* case and the *Manufacturers Hanover Trust Company* case are more or less conclusive that bank mergers are now subject to the Sherman Act and section 7 of the Clayton Act?

Mr. CLARK. I think the facts as I know them would indicate that that is so, Senator; yes, sir.

Senator THURMOND. That is acknowledged, I believe, by the banking world now, is it not? That that is the case?

Mr. CLARK. Yes, sir.

Senator THURMOND. The question here then is whether it is wise for the Congress to take some action to offset the effect of those decisions or to continue with the Justice Department having the right to block mergers that may be appropriately made by the supervisory agencies of the Government?

Mr. CLARK. The feeling of the banking world is that the present situation is intolerable and must be changed. So we support the Robertson bill.

Senator THURMOND. Now, to process merger cases in a way which would give consideration only to competitive or antitrust factors to the exclusion of other proper considerations—do you feel that would be contrary to the responsibility vested in the action agency by the Bank Merger Act?

Mr. CLARK. Senator, I wonder if I could hear that question again?

Senator THURMOND. To process merger cases in a way which would give consideration only to competitive or antitrust factors to the exclusion of other proper considerations, would you feel that that would be contrary to the responsibility vested in the action agency by the Bank Merger Act?

Mr. CLARK. I think it would be contrary to the intent of Congress; yes, sir. I think the other factors must be included—the banking factors.

Senator THURMOND. The Justice Department, of course, is interested in that facet of it? They are interested in the competitive, antitrust factors, naturally?

Mr. CLARK. Yes, sir.

Senator THURMOND. And that is the point upon which they would hinge a decision, is it not?

Mr. CLARK. That is the point upon which they are called upon to give an advisory opinion to the proper bank supervisory agency involved in a merger, and that is all they considered and the courts considered under the Clayton Act.

Senator THURMOND. Now, do you feel it would be better to amend the Bank Merger Act to allow a specified time within which an antitrust action might be brought to prevent consummation of an approved merger, or do you feel it is better to pass this bill, S. 1698?

Mr. CLARK. I feel that if the Justice Department is to have a responsibility for an opinion, that in all fairness to the depositing public, to the stockholders, and to the banks involved there should be a time limit.

Any degree of uncertainty that surrounds a merger for an indefinite length of time I believe is dangerous to the banking structure.

Senator THURMOND. Well, of course, if this bill should not pass, I presume you would favor a bill which would allow a specified time for an action to be brought before the merger takes place?

Mr. CLARK. Yes, sir. If S. 1698 should not pass, I think it would——

Senator THURMOND. Because after the merger takes place, then you have the tremendous complications of unscrambling and certain psychological effects it could have upon the public, don't you?

Mr. CLARK. That is right. It would be very——

Senator THURMOND. But as I understood from you, you would prefer this bill that is now before this committee, S. 1698? You would prefer that?

Mr. CLARK. I would prefer to see that; yes, sir.

Senator THURMOND. You would prefer that instead of a bill amending the Bank Merger Act to allow a specified time after merger takes place for Justice to sue under the antitrust laws?

Mr. CLARK. That is correct, sir.

Senator THURMOND. Do you feel that the public interest would be protected by the appropriate supervising agencies of Government now without the matter being referred to the Attorney General?

Mr. CLARK. Yes, sir. The three agencies now charged with bank supervision are staffed by capable men who have been in the business and at the time of their appointment are presumed to know what makes this business tick. I think that they exercise the best judgment that they can possibly exercise. Of course, under the Bank Merger

Act they get advice from the Justice Department on the competitive factors involved in the merger, and I am sure that advice is helpful. And I think, being trained in the banking industry, they are in a better position to act intelligently—to make the final decision—on banking matters than are the—and I don't like to pinpoint—than are the members of other departments not engaged directly in the regulation of banking.

Senator THURMOND. Again I revert to the point that the only reason the Attorney General would be in the picture would be because there would be an antitrust factor involved——

Mr. CLARK. That is right, sir.

Senator THURMOND (continuing). Or a competitive factor involved.

Mr. CLARK. Yes.

Senator THURMOND. And you feel that the appropriate supervisory agencies of Government are adequate, sufficient, and all that is necessary in order to protect the public in these matters?

Mr. CLARK. In the primary position in a merger; yes, sir.

Senator THURMOND. Thank you, Mr. Chairman.

(The following material was ordered inserted in the record by the chairman:)

[Excerpt from the Congressional Record, Oct. 8, 1963]

EXTENSION OF REMARKS OF HON. MILWARD L. SIMPSON, OF WYOMING, IN THE SENATE OF THE UNITED STATES, TUESDAY, OCTOBER 8, 1963

BANK MERGERS

Mr. SIMPSON. Mr. President, last week the junior Senator from Virginia, Mr. Robertson, and I were privileged to attend and address the 62d Annual Convention of the National Association of Supervisors of State Banks which met at Williamsburg, Va.

Among the many interesting speeches delivered at the convention was a speech by the Honorable G. Russell Clark, chairman of the board of the Commercial Bank of North America, and formerly superintendent of banks for the State of New York. In his speech, Mr. Clark discussed the Bank Merger Act and the problems which have been raised by the decision in the Philadelphia bank merger case. In his speech Mr. Clark made several suggestions for handling bank mergers which deserve careful consideration.

He also described graphically the extent to which the decision and the majority opinion of the Supreme Court in the Philadelphia bank merger case went in disregarding the purpose and intent and understanding of the Congress in enacting the Bank Merger Act of 1960.

I was much impressed by Mr. Clark's speech, and I believe that it would be helpful to the industry and to the public to make his views available to them.

I, therefore, ask unanimous consent that Mr. Clark's address at the convention of the National Association of Supervisors of State Banks be printed in the Record at this point.

(There being no objection, the address was ordered to be printed in the Record, as follows:)

WHO'S IN CHARGE?

I appreciate very much the opportunity to discuss with my former associates in the bank supervisory field, as well as my fellow associate members of NASSB, some of the basic causes for the present disturbances and anxieties which are present today in our business.

It seems to grow increasingly difficult for the average banker to keep abreast of the rapidly changing, and at times contrary, winds of supervisory opinions on a multitude of banking matters. It seems as though we need more anchor and less sail.

We are concerned with supervisory regulations and opinions in many areas including chartering, branching, interest rates, examinations, etc., but one of the most widely discussed is that of the bank merger area. I should like to direct a few thoughts in that direction.

When the Bank Merger Act of 1960 with its seven tests for applicability to bank mergers was enacted, it was claimed, and widely predicted in the publications of the day, that this legislation was the cornerstone on which, at long last, positive direction would be given to bank mergers. You will recall that this act vested authority over mergers in one of three Federal agencies; i.e., Federal Reserve Board, Federal Deposit Insurance Corporation, and Comptroller of the Currency. The jurisdiction over national bank mergers is vested in the Comptroller; State member banks in the Federal Reserve Board, and insured State nonmember banks in the FDIC.

The latter two agencies give their consideration to merger proposals following affirmative action by the respective State banking departments. The Comptroller has sole jurisdiction over national banks and also sits as one of three members of the FDIC, which has brought objection from the NASSB.

At the time of the passage of the Bank Merger Act of 1960, great debates took place as to the posture of the Justice Department in the bank merger field, and it was finally resolved by requiring the Justice Department to submit an advisory opinion on each merger before the Federal bank regulatory agency having approval jurisdction. Such advisory opinions were also required from each of the other two bank regulatory agencies.

Substantial pressure was exerted in certain quarters to place the Justice Department in a commanding position on bank merger considerations. In the testimony preceding the legislative sessions, the then Chairman of the FDIC, stated:

"No examination or review by the Department of Justice, or other agency or commission outside the bank supervisory field, of the facts of a merger transaction, can be an adequate substitute for the background, knowledge and current information which presently reposes in the supervisors."

The trend of congressional thinking on this point has been recently reflected in S. 1642, covering amendments to the Securities Act. The Senate in this bill proposes to give full and complete regulatory powers over disclosure and trading in securities of banks to the Federal supervisory agencies as against the Securities and Exchange Commission.

On June 17, 1963, a decision was rendered by the U.S. Supreme Court to the *Philadelphia National Bank* case which has had the apparent practical effect of removing conclusive judgments on bank mergers from the duly authorized supervisory agencies to the realm of legal decision.

This decision, expressing the views of five members of the Court, holds that section 7 of the Clayton Act applies to all bank mergers. To the mind of the average banker it means that regardless of approvals given by appropriate supervisory agencies, merger proposals involving banks shall be subject to Federal antitrust laws and that such mergers approved by the appropriate bank supervisory agencies are not immune from challenge under such laws.

The distinguished junior Senator from Virginia, Hon. A. Willis Robertson, who has fully demonstrated over the years a clear and objective view on banking matters, has expressed himself as shocked by the decision, and that it "is one of the most incredible cases of judicial legislation which the Court has handed down." "I was shocked," he said, "both at the result and at the Court's casual disregard for congressional intent and purpose."

In the case at hand, the Court decided that inasmuch as the proposed merger would result in the control, by one bank, of over 30 percent of the commercial bank business conducted in the Philadelphia Metropolitan trade area, section 7 would be violated. The merger would have resulted in a bank, the largest in the city of Philadelphia, with 36 percent of the area's total bank assets; 36 percent of deposits; 34 percent of net loans. It would also have resulted in making a national bank the largest bank in the area superseding the present largest bank—a State bank. It would also be able to retain this ranking even though all the remaining 39 banks in the area were to merge into the State bank.

By way of comparison, in the New York area a merger of the first and third largest banks would produce a lower percentage of all New York City bank resources than the merger discussed here would represent of all bank resources in the city of Philadelphia.

It should be mentioned here that two of the remaining Justices dissented on the ground that section 7 did not apply to bank mergers. Another agreed in part with the dissenters.

The ninth Justice did not participate in the decision.

Furnishing a partial background to this decision is the historical fact that, prior to the institution of this case, the Justice Department had taken antitrust action in only one other case—a case which was subsequently settled during the course of litigation.

To complete the background of the case in the lower court it would be helpful to quote from the opinion of the presiding justice:

"Generally, the complaint alleges that commercial banking and several of its integral parts comprise interstate commerce; that commercial banking with its integral parts fills an essential and unique role in the Nation's economy with a combination of services unduplicated by other financial institutions; that existing and potential competition in commercial banking in the Philadelphia area would be substantially and unreasonably lessened; that the merger would substantially and unreasonably increase concentration in banking in the Philadelphia area and that existing and potential competition in the commerce and industry served by commercial banks in the Philadelphia area would be substantially and unreasonably lessened. Parenthetically it may be noted at the outset that the last of these averments has not been seriously presented by the plaintiff and, for all practical purposes, has been abandoned."

From the viewpoint of the layman—and the average banker—the foregoing serves to highlight one outstanding fact: that this decision by the highest court in the land has changed all the ground rules applicable to mergers in the banking field. In one thrust we have been placed in a position where no longer can a banker, contemplating a merger operation, look only at the proposal from the standpoint of long-range economic effect on the community or trade area in which his bank is located. Banks are now in the general position vis-a-vis antitrust statutes of any other corporate entity, inasmuch as the decision applies to all mergers, including mergers between banks. Our previous posture, under which banking has operated for so long a time, has now apparently been dissolved. Under the belief that banking has been for years closely regulated and subject to supervision and controls of governmental bank supervisory agencies, both State and Federal, we felt, perhaps overoptimistically, secure in our belief that further controls were unwarranted and unnecessary. The thoroughness of the Congress in its consideration of Senate bill 1062 in the spring of 1960 indicated crystallized opinion on the question of the agencies of Government which should be charged with responsibility for approval of bank mergers. Senator Fulbright, who with Senators Robertson and Capehart, were sponsors of the bill, said in presenting the bill for vote:

"As it passed the Senate, S. 1062 expressed the view of the Senate, for the third time, that bank mergers should be regulated by the Federal banking agencies on the basis of banking factors and competitive factors and with no single factor being in itself controlling. S. 1062 was a clear statement, for the third time, of the Senate's view that the provisions of section 7 of the Clayton Act should not apply to bank mergers. The amendments to S. 1062 made by the House do not change this aspect of the bill. The House has agreed with the Senate that bank mergers should be controlled by the Federal banking agencies on the basis of both banking factors and competitive factors, and that section 7 of the Clayton Act should continue to be inapplicable to bank mergers."

The Bank Merger Act of 1960 also received the following accolade from the then Senator Johnson of Texas on the day it passed the Senate:

"This bill establishes uniform and clear standards, including both banking and competitive factors, for the consideration of proposed bank mergers. It eliminates a number of gaps in the statutory framework, which now permits many bank mergers to occur with no review by any Federal agency. It provides for a thorough review by the appropriate Federal bank supervisory agency, under these comprehensive standards, and with the benefit of any information which may be supplied by the Department of Justice in the report required from them, of the bank mergers by asset acquisitions and other means which are now and will continue to be exempt from the antimerger provisions of section 7 of the Clayton Antitrust Act."

By comparison, in his dissenting opinion, Justice Harlan while saying that section 7 of the Clayton Act did not apply to a bank merger, said with respect to the Bank Merger Act of 1960, "its enactment turns out to be an exorbitant waste of congressional time and energy."

In the hit show, "The King and I," the King sings a lovely song in which he expresses the thought that those who seek to protect him will protect him out of all he owns, and concludes that it is a puzzlement. So it is with the average banker as he views the judicial-legislative-supervisory fog which surrounds his objective merger. He is advised to consult competent counsel and to take advantage of the Antitrust Division's clearance procedure. Does the banker, or his counsel, first consult his primary supervisory agency; the Federal Reserve Board; the FDIC; or the Comptroller following his State supervisor; or does he commit

what may be the unpardonable sin of going over their respective heads to the Antitrust Division?

To the layman, therefore, it now appears that the advice which the primary supervisory agency was required to seek from the Department of Justice by the intent of Congress, is now no longer to be categorized as advisory, but rather, in the nature of a warning that if the decision reached by the primary agency is not parallel to that of Justice, then a suit may be forthcoming.

A spokesman for the Division said recently that "assuming that all relevant information regarding a proposed merger has been supplied to us, and as soon as the agency having initial jurisdiction has advised us of its decision, we shall advise such agency and the parties to the proposed merger of any action that the Antitrust Division intends to take regarding the merger." The element of time involved in consideration of a merger is most important to a participating bank, its depositors, its shareholders and the trade area it serves. It is to be hoped that there will be no undue delay in finalizing opinion on a merger, and if there is no action to be taken by the Division it would not seem unreasonable to expect a prompt statement to that effect. In effect, it appears to place the three bank supervisory agencies in the position of the average State bank supervisor, namely, that it has only the initial veto power and any approval that it may extend may be vitiated by a nonbank governmental agency. The only criteria which Congress apparently delegated to the attention of the Justice Department in mergers was that of the competitive factor, which has now, apparently, contrary to the intent of Congress, been assigned the role of the primary and dominating factor of the seven controlling factors. The traditional banking factors have been relegated to a place of secondary importance.

It is a fair statement, I believe, to say that relatively few bank mergers do not have some elements of lessening of competition; but, converesely, favorable consideration of the banking factors may justify an agency granting approval of a merger even though it may have an adverse effect on competition.

To illustrate the wide range of terminology upon 115 mergers submitted to the Justice Department for comment, as published in the recently released annual report of the comptroller for 1963, we read the following characterizations of the basis for Justice Department advisory opinions:

"Favorable	0
No adverse effect	12
Not substantially adverse	37
Slightly adverse	3
Adverse effect	26
Significantly adverse	3
Substantially adverse	34
Substantially adverse and serious anticompetitive effect	7
Threat of litigation	1
Total	115"

NOTE.—Total as shown in the report although it adds to 123.

On the same merger proposals, the Federal Reserve Board employed the following terminology regarding its advisory opinions:

"Will increase competition	4
May increase competition	7
No adverse effect on competition	33
No serious adverse effect on competition	3
Will have little adverse effect on competition	21
Probably no adverse effect on competition	2
Might have adverse effect on 2 parties	2
Might have adverse effect on competition	6
Will eliminate competition between 2 banks exposing remaining banks to greater competition	11
Will eliminate some competition	12
Will eliminate substantial competition	6
Will have adverse effect on competition	2
Will eliminate present and potential competition	5
Will result in concentration	1
Total	115"

The FDIC was concise, by comparison:

"Enhancement of competition	1
Overall effect on competition would not be unfavorable	102
No effect on competition	2
No adverse effect on competition	1
Appears favorable	1
Effect would be unfavorable	8
Total	115"

The report also reveals that the Comptroller approved during 1962, 110 applications for merger, including 3 emergency decisions, while denying 7, and 1 was withdrawn.

During the same year according to the annual report of the Federal Reserve Board, the board approved 37 and disapproved 5 mergers, consolidations, acquisitions of assets or assumptions of liabilities. This report also reflects that 94 reports on competitive factors were sent to the Comptroller and 38 reports to the FDIC.

Banks are, therefore, in a never-never land as far as mergers are concerned. It appears that the tiniest nuance of judgment on the part of any one of the agencies involved may throw a merger one way or the other. The absence of unanimity as between the governmental agencies involved as to the worthiness of a merger has beclouded the atmosphere and has led to proposals for a single Federal commission to rule on bank matters including mergers. The banker, therefore, finds himself in a most difficult position, not knowing what laws, rules, regulations or interpretation are applicable to his proposals.

We can appropriately characterize the present situation as one where we are confused with promotional interpretations—in other words, interpretations of laws and regulations which tend to favor one group of banks under a supervisor against other groups of banks under other supervisors. This tends to create a great deal of dissatisfaction among those who are left without equalizing privileges and may cause banks to shift from State to national bank basis or vice versa, depending upon the degree of enforcement of sound and conservative banking practice or conversely, the relaxation of the same standards.

To add to your collective confusion, a thought-provoking passage appears in the district court's opinion which may have escaped your attention, and which I quote:

"The court was not impressed with the attempts of the Government to show that banking is of minor importance in the life of a community generally and of almost absolute unimportance in the business life of the community. The Government, in its attempt to establish this contention by testimony that no single particular individual industrial organization has ever entered a particular territory because of the presence or absence of banking facilities, has ignored the industrial history of the United States. Should one ever speculate as to whether any industry would enter a community without banking facilities, the answer would be completely obvious. Historically, banking facilities have preceded industry in every community."

As bankers, we have been trained in the belief that we are, and have been by practice and tradition cast in the role of service institutions. It comes as somewhat of a shock to learn, particularly in the centennial year of the dual banking system, that, as indicated by the court, a high officer of Government evaluates our services at such a minimal level. It confirms the thought that if Federal authority ever reaches a point where it supersedes and submerges the authority of States over State banks, that will be the point of no return and will mark the demise of the dual banking system.

The greatest deterrent to this trend is the capable and efficient State bank supervisor. In spite of long experience in this field, I am not one who believes that the old way is necessarily the best way to conduct our business, either as bankers or as supervisors. As we have grown as a nation from an essentially agrarian society to the foremost industrial power in the world, the challenges and opportunities for development of our country through our banking system have required the continuing broader development of the public interest objective by bank supervisors. Yours are the standards of judgment by and under which we operate our banks. We can be helped by your awareness of our problems and we may be hindered in our progress and services if you take a position against progressive thinking.

Your appraisal of the needs of a sound and conservative banking system is the fulcrum upon which can tilt the vitality and effects of our efforts. There have been a number of proposals designed to break the logjam which seems to exist in consideration of bank mergers and chartering by supervisory agencies. It seems to me that if criticism of a system is undertaken, then a responsibility exists for suggestions to effect corrections in that system. Accordingly, I submit the following outline of a plan for a more uniform and understandable course to be followed in bank merger applications by supervisory agencies:

1. That bank mergers and charters be first considered by a district committee composed of (a) the superintendent of banks of the State in which the banks seeking to merge are located, (b) the chief national bank examiner of the district, (c) the chief FDIC examiner of the district, (d) the chief Federal Reserve bank examiner of the district. In any case the representative would be the senior official of his agency in the district in which the applicant banks are located.

Approval of a merger would require a three-fourths vote of those participating as above.

If disapproved by the district committee, the application would be terminated. If approved, notice of such approval would be given to the applicant banks and to a Board of Review located, for convenience, in Washington. This Board of Review would be given not more than 30 business days after receipt of such approval of the district committee, to indicate its disapproval of a merger or charter application; otherwise the decision of the district committee would stand. To carry out the intentions of Congress as expressed in the Bank Merger Act, notice of the approval of the district committee would also be furnished to the Justice Department with the provision that the views of the Department on the competitive effects of the merger be furnished to the Board of Review not more than 30 business days after receipt of such notice.

The Board of Review would be composed of the following representatives appointed by their respective boards for a term of 3 years:

1. A member of the Federal Reserve Board.
2. A member of the FDIC Board, assuming that the previous legislative recommendation made in this connection by the NASSB is adopted; namely, that the Comptroller of the Currency should not be a member of the FDIC Board.
3. The Comptroller of the Currency.

Disapproval of a merger would require a two-thirds vote of the Board of Review.

I am aware that many proposals along these lines have been previously made. It is always possible, however, that perhaps from the sum of ideas represented, a gleaning by the proper legislative body of these proposals would produce a pattern which would serve to alleviate the present ferment in our industry.

It has been said that we are the victims of our own shortcomings. Avoidance of public controversy, and indeed, avoidance of contact with our legislative representatives has long been a hallmark of our behavior. We have need for a better field of understanding on the part of both segments. The leaders of our industry as well as our trade associations, acting in concert with the progressive, intelligent State supervisory and legislators can contribute much at the grassroots level of each State to bring about a clearing of the uncertainty that impedes our ability to fully serve the free enterprise economy which has made this country ourstanding on the pages of history.

PUBLISHED OPINIONS ON BANK MERGER APPLICATIONS

Reprinted below are the texts of the published decisions of the Superintendent of Banks on bank merger applications, and of his recommendations to the Banking Board, which were followed by the Board, on bank holding company applications during 1961.

BANK MERGERS

*Manufacturers Trust Company—The Hanover Bank**

INTRODUCTION

Manufacturers Trust Company (hereinafter sometimes referred to as "Manufacturers") and The Hanover Bank (hereinafter sometimes referred to as "Hanover"), each being a trust company organized under Article III of the Banking Law, have applied for approval by the Superintendent of Banks of a plan of merger of Hanover into Manufacturers, under the name "Manufacturers Hanover Trust Company" (hereinafter sometimes referred to as "Manufacturers Hanover"). The plan of merger and certificates of approval of the plan by the requisite votes of directors and stockholders of the applicant banking corporations have been submitted to the Superintendent in accordance with the provisions of Section 601 of the Banking Law.

The two institutions have applied further for approval by the Banking Board of the maintenance by Manufacturers Hanover of Hanover's twelve offices in Manhattan and its two offices in London.

Manufacturers conducts its banking and trust business at its principal office at 44 Wall Street in Manhattan, and at its 121 branch offices located in Manhattan, Brooklyn, Queens and the Bronx. Manufacturers also maintains five overseas representative offices—four in Europe and one in the Far East. Hanover con-

* Opinion of Superintendent of Banks G. Russell Clark.

ducts its banking and trust business at its principal office at 70 Broadway, and at its eleven branches in Manhattan. Hanover also operates two branches in London, as well as representative offices in Paris and in Beirut, Lebanon.

Manufacturers, New York City's fifth largest bank in terms of total assets (holding 8.9% of such assets), is engaged in both the "wholesale" and "retail" aspects of banking. Hanover, holding 4.6% of total commercial banking assets in New York City, is the City's eighth largest bank, and engages almost exclusively in "wholesale" banking. Manufacturers Hanover, the merged institution, would be New York City's third largest bank, holding approximately 13.5%* of all commercial banking assets in the City.

STATUTORY CRITERIA

Section 601-b of the Banking Law, as enacted by Chapter 237 of the Laws of 1960 (the "Omnibus Banking Act"), and re-enacted by Chapter 146 of the Laws of 1961**, sets forth the criteria to be considered by the Superintendent in determining whether to approve a proposed merger of corporate banking organizations. The statutory criteria are:

(i) The declaration of policy stated in Section 10 of the Banking Law, that the business of all banking organizations shall be supervised and regulated through the Banking Department in such manner as:

- (a) "to insure the safe and sound conduct of such business";
- (b) "to conserve their assets";
- (c) "to prevent hoarding of money";
- (d) "to eliminate unsound and destructive competition among such banking organizations";
- (e) "to maintain public confidence in such business"; and
- (f) "to protect the public interest and the interests of depositors, creditors, shareholders and stockholders".

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* The percentages above set forth were computed as at June 1960.

** Such re-enactment followed a decision that Chapter 237 of the Laws of 1960 was void for procedural defects in the manner of its passage (*Franklin National Bank of Long Island* v. *Clark*, 212 N.Y.S. 2d 942 [Supreme Court, Special and Trial Term, New York County, March 14, 1961]). The cited action was subsequently discontinued by stipulation, no judgment having been entered therein.

(ii) Whether the effect of the merger for which approval is sought shall be either

(a) to expand the size or extent of the resulting institution "beyond limits consistent with adequate and sound banking and the preservation thereof", or

(b) to result in a concentration of assets "beyond limits consistent with effective competition".

(iii) Whether such merger may result in such a lessening of competition

(a) "as to be injurious to the interest of the public", or

(b) "tend toward monopoly".

(iv) "[P]rimarily, the public interest and the needs and convenience thereof."

Banking Factors

Not all of the Section 10 tests, as incorporated by reference in Section 601-b, bear significantly upon the merger application. The standards relating to safe and sound conduct of the banking business, conservation of assets, prevention of hoarding, and maintenance of public confidence, present no difficulties. The business of the respective applicants has been safely and soundly conducted by them; their assets have been conserved and, indeed, have grown; and a high degree of public confidence in the two banks has been maintained. There is every reason to suppose that such factors would remain favorable in the event of approval and consummation of the proposed merger. The hoarding of money does not present a problem at this time.

Similarly, the interests of creditors would not be affected by the merger to any meaningful degree, in view of the excellent financial condition of both Manufacturers and Hanover. The interests of stockholders, to the extent demonstrated by their overwhelming vote in favor of the merger (86.7% in the case of Manufacturers and 90.4 in the case of Hanover), appear in their own judgment to warrant approval. That the interests of stockholders would not be adversely affected by the merger is further borne out by the Department's analysis of certain banking factors. This study will be presented in detail to the Banking Board at its meeting in connection wtih the merger application.

Some further comment is appropriate, however, in regard to a matter relating essentially to the factors of conservation of assets and protection of the interests of stockholders.

The Chairman and chief executive officer of Manufacturers, Mr. Horace C. Flanigan, is a party to an employment contract with Manufacturers. The contract was a subject of discussion at the March 8, 1961, stockholders' meetings of both banks, at which meetings the plan of merger was approved. The terms of the contract had been approved earlier, on November 18, 1957, by the Board of Directors of Manufacturers, and it was executed on that day.

The Board of Directors of Hanover reviewed the contract, following its stockholders' meeting at which the plan of merger had been approved. The Hanover Board, on March 14, 1961, by resolution declared that such contract would not be adverse to the interests of the merged institution.

While generous, the contract cannot properly be characterized as wasteful of the assets of Manufacturers, or prejudicial to the interests of its stockholders. The nature and quality of the services rendered to Manufacturers by its Chairman, his standing as a banker of long experience and proven ability, and the standards of compensation of senior executives prevalent among banking organizations and other financial institutions of comparable size, tend to support the terms of the contract. The Superintendent is without authority to interfere, unless compensation paid to a bank officer can reasonably be found so excessive as to constitute waste of the institution's assets, or to reflect unsafe or unsound conduct of its business. In my opinion, such is not remotely the case here. Under the circumstances, the salary and other conditions of employment of its senior officer are matters for the judgment of Manufacturers' directors, and not for supervisory action by this Department.

Remaining for discussion are the following Section 10 standards: (1) "to eliminate unsound and destructive competition among such banking organizations", (2) to "protect the public interest", and (3) to protect "the interests of depositors". Also classified as a banking factor is (4) whether the proposed merger would expand the size or extent of the resulting institution "beyond limits consistent with adequate and sound banking and the preservation thereof" (Section 601-b).

1. Elimination of unsound and destructive competition among banking organizations

As I have had occasion to note*, vigorous and aggressive com-

* Memorandum of the Superintendent, Chemical Corn Exchange Bank-New York Trust Company merger application (1959); Bankers Trust Company-The County Trust Company (New York Holding Corporation) bank holding company application (1961).

petition among commercial banks and other banking organizations exists in New York City, but not to a degree or of a kind which may properly be characterized as destructive or unsound. Neither of the trust companies involved in the present application is suffering injury or impairment of its sound financial condition by the competitive practices of other financial institutions. Were such the case, it might well afford a positive basis for approval of a merger application. Absent unsound or destructive competition, however, this factor weighs neither in favor of nor against approval of the proposed merger.

2. Protection of the public interest

Discussion of this factor may be deferred in part until we reach the primary factor enunciated in Section 601-b, "the public interest and the needs and convenience thereof". However, the banking factors relating to (a) capitalization, (b) liquidity, (c) asset classifications, (d) the premium proposed to be paid to stockholders of Hanover upon consummation of the merger, (e) management classification and succession, and (f) financial history, may conveniently be reviewed here.

[The Superintendent presented to the Banking Board an analysis of the above-listed factors, finding them either favorable or without adverse significance.]

3. Protection of the interests of depositors

Those present depositors of Manufacturers who avail themselves of its extensive retail banking services would be little affected by the proposed merger. Such services would, according to the applicants, continue to be offered on substantially similar terms. A full range of retail deposit services, including savings accounts, would also be afforded to the depositors of Hanover at its branches to be operated by the merged bank.

For the larger depositors of each institution, no particularly significant effects are expected. Each of the applicants is presently offering to such depositors the deposit services they require. Some improvement and expansion of the range of available services to these depositors in their capacity as customers (i.e., as borrowers and users of specialized banking facilities) is contemplated if the merger is approved.

4. Preventing expansion of the resulting institution to a size or extent inconsistent with adequate or sound banking

The institution resulting from the proposed merger would be,

as previously noted, the third largest commercial bank in New York City; it would hold substantially over $5 billion in commercial banking assets, or 13.5% of the total of such assets in the City; and it would operate some 135 banking offices in four boroughs of New York City, as well as several foreign branches and representative offices.

Two banking institutions larger than the proposed merged bank now exist in New York City, and one such larger bank elsewhere. These larger banks are adequately and soundly managed and operated. It may be expected that from a merger of the applicants there would result some operating economies, additional training facilities for personnel, over-all improvement of certain services, and strengthening of management. Accordingly, this factor does not present an obstacle to approval.

Competitive Factors

The Superintendent's statutory guides require that in determining whether to approve a merger he consider the effect upon competition inherent in the proposal, and inherent in the resultant concentration of banking assets.

The techniques of economic analysis familiar in the administration of the antitrust laws are useful in so assessing the competitive impact of a proposed bank merger. In this connection, the relevant geographic market areas are delineated in the light of prevalent business practices and patterns in commercial banking. Such market areas are delineated for each of the important banking services rendered by the banks involved. The effect of the proposed merger upon competitive conditions in each such market must then be evaluated. The Banking Department's inquiry is therefore directed toward these questions:

May the merger result in a lessening of competition to an extent injurious to the interests of the public?

May the merger result in a tendency toward monopoly in any relevant market area for any line of banking commerce?

Will the merger result in a concentration of banking assets beyond limits consistent with effective competition?

The Department's scrutiny does not stop, however, with an estimate of the purely competitive aspects of the proposal. Primarily to be considered and weighed is the final statutory factor, that of the public interest and the needs and convenience thereof. Thus, there remains some range for the exercise of a sound supervisory discretion (Banking Law, §12[3]), based upon this Department's understanding and evaluation of the public's need for

banking services, and the reasonably to be anticipated role of the merged institution in meeting such need.

The Banks Involved

Manufacturers Trust Company, New York City's fifth largest commercial bank in terms of assets, holds approximately $3.3 billion* in such resources, or 8.9% of commercial banking assets in the City. Manufacturers operates the greatest number of commercial banking offices in New York City, its 122 offices comprising 19.5% of the total.

The Hanover Bank, New York City's eighth largest commercial banking institution, holds approximately $1.8 billion in resources, or 4.6% of the total in the City. Hanover's twelve Manhattan banking offices comprise 1.7% of the total of such offices in New York City.

Giving effect to the merger, the combined institution would become New York City's third largest commercial bank, holding approximately $5.1 billion in assets, or 13.5% of the City's total, and operating the largest number of offices, comprising 21.2% of total commercial banking offices in New York City. It may be noted that the merger would have no effect upon branch concentration in the boroughs of New York City other than Manhattan, since all of Hanover's domestic offices are located in the latter borough. Such combined number of offices for the merged institution in Manhattan would be 54, out of a total of over 300, or approximately 17% of the total in Manhattan.

Manufacturers is engaged both in so-called "retail" and "wholesale" banking activities. Hanover, on the other hand, is predominantly a "wholesale" bank, engaged on but a limited scale in "retail" banking. Accordingly, the major impact of the proposed merger would be in the areas of "wholesale" banking services which both banks offer.

Lines of commerce and relevant geographic market areas

Concentration ratios based on such aggregative measurements as total assets, or number of offices, are not sufficiently informative in appraising the degree to which a bank merger may reduce competition. Rather, it is necessary to determine in which specific geographical and service markets competition may be affected. Analysis is required of each of the major banking activities in which Manufacturers and Hanover are engaged, including depos-

* All data are as at June 1960, unless otherwise indicated.

itary and lending activities, and personal and corporate trust services. Each of these will be examined for any adverse effects on competition inherent in the merger proposal.

Deposits

1. *Private Demand Deposits*—In June 1960, New York City commercial banks held $18.2 billion in demand deposits of individuals, partnerships and corporations. Of this total, Manufacturers and Hanover held 8.1% and 4.7%, respectively.

(a) *Special Checking Accounts*—The geographic market area for special checking accounts is local, and limited to commercial banks within the metropolitan area offering such service. Indeed, such market areas may be further circumscribed to within convenient distances from the homes or places of employment of depositors. Some further discussion on this point will be found in the section of this statement dealing with branch concentration. Recent estimates place the number of special checking accounts in New York City at somewhat over 1,000,000. Manufacturers, with approximately 250,000 such accounts, or 20–25% of the total, is a leader in this field in the City. Measured by dollar volume of special checking accounts, a comparable concentration ratio can be expected.

However, the proposed merger would have little effect upon concentration, since Hanover has less than 4,300 such accounts—nearly 3,000 belonging to its employees—for a total constituting less than ½ of 1% of accounts held by all the New York City banks. There would remain in New York City more than twenty other commercial banks offering this service to the banking public.

(b) *Regular Checking Accounts*—Of the total of about $18 billion held in regular checking accounts at all New York City banks, the merged bank would hold over $2.2 billion, or about 12%.

Regular checking accounts originate in part from individuals and firms which may be considered as in the local market, and in part from firms of national stature to which numerous alternatives are available throughout the country. For example, 97% and 71%, respectively, of the *number* of Manufacturers' and Hanover's regular private checking accounts originate from local* firms and individuals, as do about 71% and 39%, respectively, of the total dollar amounts of such deposits. The balance comes from "national" accounts.

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* Defined so as to exclude those corporations with major executive or treasurers' offices or major plants outside the New York City metropolitan area.

Using a somewhat different measure of the character of depositors—size of deposit accounts—99% of the number of Manufacturers', and 96% of the number of Hanover's regular private checking accounts, are under $100,000. By dollar amounts, 52% of Manufacturers' and 24% of Hanover's regular checking accounts are in the under $100,000 category.

The effect of the merger on small, local depositors would be to eliminate one banking alternative, still leaving several dozen New York City banks which offer regular checking accounts.

Nor would any significant adverse competitive effect result to holders of large regular checking accounts, in view of their size and of the available alternatives both in New York City and elsewhere. That these are actual, and not merely potential alternatives, is evidenced by a random sample taken by the two banks. The sampling indicated that more than 85% of their large depositors maintain checking accounts with other banks outside the New York City metropolitan area.

2. *Interbank Deposits*—At present, Manufacturers ranks sixth, with 7.7%, and Hanover seventh, with 6.6% of the total interbank funds (both demand and time) held by New York City banks. With 14.3% of such total, the merged bank would occupy the third position. However, the market area for competitive purposes should be considered predominantly national.

Out-of-town banks can and do utilize the services of banks in other major cities in maintaining correspondent balances. In fact, New York City banks hold in the aggregate only approximately 40% of the total interbank deposits held by all central reserve and reserve city banks. Viewing this market as national, the combined institution would hold only about 6% of all interbank deposits.

3. *Savings Deposits**—Approval of the merger would have no effect on competition for savings deposits, since Hanover does not accept such deposits. The share of the total held by Manufacturers would remain unchanged at 20% of the total held by all New York City commercial banks. Considering the competition for savings afforded by savings banks and savings and loan associations in New York City, the merged institution would hold only about 2% of the city-wide total. To the extent that out-of-state savings and loan associations also compete for savings deposits of New York City residents, the merged bank's share of the total market would be even smaller.

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* Since most of the other private time deposits of the two banks originate in their trust departments, no competitive problems arise as to them.

Loans

1. *Commercial and Industrial Loans*—Manufacturers, with 6.5% of the total, and Hanover, with 4.9%, together hold 11.4% of all commercial and industrial loans made by commercial banks in New York City. The merged bank would occupy third place as a source of such credit in the City.

To cast additional light on the significance of these concentration ratios, the characteristics of commercial and industrial borrowers should be examined in some detail.

(a) *Small Borrowers*—Generally, small firms are limited to choice among local banking facilities. Considering size of loan as a rough index to the size of the borrower, 93% of the number of all commercial borrowers and 17% of the dollar volume of commercial and industrial loans outstanding at Manufacturers were in the under $100,000 loan category. Comparable data for Hanover were 54% and 2%, respectively. If $500,000 is regarded as the dividing line between small and large borrowers, it is noted that 98% of the number and 28% of the dollar volume of Manufacturers' business loans represent loans of under $500,000 each, while comparable data for Hanover are 76% and 10%, respectively.

The proposed merger should result in but minor adverse competitive effects on small borrowers, in view of the numerous available alternatives among the several dozen other commercial banks in the City.

(b) *Large Borrowers*—By dollar amount, most of the commercial lending resources of the two applicant banks have been made available to large borrowers. For example, 83% of Manufacturers' business loans are in the over-$100,000 category, and 72% in the over-$500,000 category; for Hanover, the comparable percentages are 98% and 90%. Large borrowers are unlikely to be affected adversely by a reduction by one in the number of large New York City banks, since such borrowers have access to numerous other sources of credit, both bank and non-bank, in New York City and throughout the country.

That there are seventeen commercial banks outside New York City with over $1 billion each in resources indicates the scope of competition for large loans. In addition, many large borrowers can and do avail themselves of the commercial paper markets, private placements with insurance companies and others, and the bond markets*.

* Since 40–50% of the two banks' business loans are term loans, even the bond markets are at least in part competitive with business loans extended by the banks.

The merger application shows that the overwhelming majority of large borrowers from the two banks have credit available from other sources, far exceeding in the aggregate the loans or credit lines extended to them by Manufacturers and Hanover.

2. *Loans to Purchase or Carry Securities*

(a) *To Brokers and Dealers*—The impact of the merger upon competition in brokers' and dealers' loans would not be significant. Manufacturers' share would increase only moderately, from its present 5.5% to 8.5%, the merged institution taking fourth place among the forty-two banks and foreign agencies in New York City extending such loans.*

Based on number of borrowers, 81% of Manufacturers' and 34% of Hanover's loans to brokers and dealers are in the over $100,000 category, as are 99% and 94% of the respective banks' brokers' loans measured by dollar volume. In the over $500,000 category are 45% of the number of Manufacturers' loans, and 8% of Hanover's, as are 92% and 77% of the respective banks' brokers' loans measured by dollar volume. Numerous other sources of credit are available to virtually all such borrowers, far exceeding the amount of loans or lines extended to them by Manufacturers and Hanover.

Similarly, brokers and dealers in the smaller loan categories virtually all have access to other credit lines. While the proposed merger would reduce their alternative sources by one, more than forty other financial institutions in New York City extend this type of credit.

(b) *To Others*—The competition in loans (to others than brokers and dealers) to purchase or carry securities is partly local and partly national, depending on the type of borrower. Such competition would be affected only slightly by approval of the proposed merger. As a share of all such loans by New York City banks, Manufacturers has 4.5% and Hanover has 3.4%. The combined institution's share of the market would be 7.9%.

3. *Loans to Financial Institutions*—In loans to financial institutions (domestic and foreign banks, finance companies, factors, etc.), Manufacturers holds 8.1% of the New York City bank total, and Hanover holds 5.7%. This is, however, part of a national market. The average size of each such loan at the two banks is over $1 million. Most of these loans by the two banks are to finance com-

* Current Federal Reserve studies also show that in recent years non-financial corporations have been supplying from one-third to one-half of the government securities dealers' credit needs.

panies and factors, which use numerous other sources of credit, as shown in the merger application. The merged bank would have 5% of the national market.

4. *Consumer Instalment Loans*—The merger would have virtually no effect upon competition for consumer instalment loans, since Hanover accounts for less than 0.1% of the New York City banks' total. Until a year ago, Hanover offered no personal loan services. At the end of 1960, less than 1,000 such loans were outstanding at Hanover, compared with a total number of about 190,000 for Manufacturers.

Holding 14.3% of the citywide total, Manufacturers occupies second place in New York City, as would the merged bank, with respect to consumer instalment loans.

5. *Real Estate Loans*—Giving effect to the merger, Manufacturers Hanover would be New York City's second largest source of commercial bank mortgage credit, with a 19.5% share.

About 30% of the applicant banks' mortgage loans are on properties located within New York State. Viewed as a statewide market, the in-state mortgage lending activities of savings banks, savings and loan associations, insurance companies and upstate commercial banks would have to be included. So viewed, the combined share of the market for the two banks would be about ⅛ of 1%. Nationally, the lending activities of the above-mentioned types of institutions throughout the country would also be included. Measured from this base, the merged institution would hold as its share only an estimated 1/10 of 1% of total real estate loans.

Trust Services

1. *Personal Trust Services*—Both Manufacturers and Hanover provide a wide range of personal trust services. Each major type of service will be examined to determine the competitive impact of the proposed merger.*

(a) *Voluntary and Court Trusts*—At present, Hanover is the fourth largest and Manufacturers the ninth largest corporate fiduciary in New York City with respect to voluntary and court trusts, holding 10.5% and 6.2%, respectively, of all such accounts held by trust companies in the City. The merger would give the merged institution 16.7% of the total, moving it into first place among New York City's trust companies.

The market area for voluntary and court trusts tends to be largely local in character, because of greater convenience to

* Citywide data, based on Banking Department 1959 questionnaire survey.

individuals in dealing with local institutions, and because legal restrictions in many states forbid out-of-state trust companies from acting in a fiduciary capacity with respect to "court" trusts. However, some large trust accounts are obtained by New York City trust companies from out-of-town or out-of-state residents. The figures submitted by Manufacturers indicate that 84% of the number of its accounts originate in the New York metropolitan area, although only 54% of Hanover's accounts originate locally. For the two banks combined, about 65% of such accounts originate locally.

Considering the market area to be primarily, although not entirely local, the merger would eliminate competition comprising an estimated 7% of such local market. However, this percentage overstates the amount of competition actually being eliminated. It does not take into account the non-bank competition from attorneys, business associates of settlors of trusts, professional individual trustees, and others. Some indication of the non-bank competition may be found in the Treasury Department's publication, "Statistics of Income". For the year 1958, that study reveals that approximately 36% of all trusts for which tax returns were filed were *not* administered by banking institutions. For the very large trusts ($100,000 annual income or more), almost 45% of such trusts were not administered by banks or trust companies. Thus, taking into account the non-bank competition, the merger would eliminate less than an estimated 5% of the local market.

Whatever the amount of competition eliminated, the resulting trust company would still be in active competition with the eight other New York City trust companies engaged in this business on a large scale (over 1,000 accounts each), and with more than a dozen smaller New York City trust companies and other trust companies in the suburban areas around New York City. Further, to the extent that trust accounts originate elsewhere than in New York City, competition from fiduciaries throughout the country should be considered. For these non-local trust accounts, the competition that would be eliminated amounts to less than 2%, and the merged bank's share of the national market would be less than 5%.

(b) *Agency and Custody Accounts*—Hanover's share is 7% of the New York City banks' total of such accounts, and Manufacturers' share is 3.8%. The merged institution's share would be 10.8% of such total.

Most of the accounts (over 60%) of each of the applicants originate in the New York City metropolitan area. Substantial lessening of competition by reason of the merger is unlikely in

view of the limited percentage of the market that the merged bank would hold, and the activity of several dozen local competitors. Moreover, to the extent that a substantial fraction of agency and custody accounts originate outside the local area, the market may be considered national in character. The merged bank's share of such market is estimated at 7.5%.

Further, numerous alternatives to commercial bank trust departments are available. Some accounts, for example, require investment advisory services which are offered by hundreds of investment counselors in New York City, by many brokers, investment bankers, investment advisory services and publications, and indirectly, by investment companies and mutual funds.

(c) *Pension Fund Trusteeships*—Both Manufacturers and Hanover act as trustees for pension funds. Measured by the number of pension funds held, Manufacturers has approximately 10% and Hanover about 6% of the total held by the nineteen New York City banks offering such service. Should the proposed merger be approved, the resulting bank would account for 16.3% of the total, as the second largest pension fund bank trustee in the City.

Measured by book value of assets of such funds, however, the effect of the proposed merger would be minor. The share of the merged institution in the citywide total on this basis would be only 5.3%.

Moreover, the percentages given above overstate substantially the degree of competition which would be eliminated by the merger, since the market for such services is predominately national. Over 75% of the pension funds held by Manufacturers and Hanover are those of national corporations able to exercise a wide choice among numerous banks in major cities. The national character of competition is suggested by the fact that all New York City banks hold, in the aggregate, only about 40% of the assets of non-insured pension funds. Only 1% of the national market would therefore be held by the merged bank, with seventeen other banking institutions in New York City, among others elsewhere, offering pension fund services.

(d) *Profit Sharing Funds*—Measured by number of profit sharing funds, Manufacturers accounts for 16.1% of the citywide total. The merger would result in a share for the resulting institution of 21.5% of the number of such funds, second among City banks.

By book value of assets in such funds held by them, Hanover ranks sixth and Manufacturers eighth, with 6.1% and 3.2% of the citywide total, respectively. The resulting institution, with

9.3% of the total, would hold sixth place among the twenty banks in New York City acting as trustees for profit sharing funds.

Material submitted by the applicants indicates that the market is local in part and national in part. In the case of Manufacturers, about two-thirds of the various profit sharing funds it holds originate locally. In the case of Hanover, 39% originate locally.

The figures given above overstate the competitive effects of the proposed merger, however, in that they do not take into account non-bank competition. A recent study based on a sample of profit sharing funds, indicates that about 32% of such funds are *not* trusteed by banks.* On this basis, Hanover's share of the market would be reduced to less than an estimated 4%, and the merged bank's share to less than 15% of the total.

In addition, the merged bank would be competing with nineteen other New York City banks offering this service. To the extent that such accounts are drawn from elsewhere than New York City, the merged bank would have less than 1% of the estimated number and estimated asset value of these accounts.

Finally, it appears that the applicants hold profit sharing funds of substantially different average size. Hanover's average is $750,000 per fund, while Manufacturers' average is less than $140,000. This difference is pointedly demonstrated by the fact that while Manufacturers' share is 16% of the number of profit sharing funds held by New York City banks, its share is only 3.2% if measured by book value of assets in such funds. Thus, Manufacturers occupies second place among New York City banks, based on the number of such funds held, but ranks eighth if the funds are measured by book value of their assets. By way of contrast, Hanover holds 5.5% of the number of such funds, and 6.1% of the book value of their assets. To the extent, therefore, that Manufacturers deals with smaller firms and is trustee of such firms' smaller profit sharing funds, it operates in a different market than Hanover does.

Indeed, Manufacturers, to a large extent, operates in a different market than all the other large New York City banks, since among the eight New York City banks most active as profit sharing fund trustees, the average size of funds varies from about $570,000 to almost $3 million per fund, whereas Manufacturers' average size fund is less than $140,000. Accordingly, no adverse effects in the competitive markets for profit sharing funds are likely.

* J. J. Jehring, "The Investment and Administration of Profit Sharing Funds" (Profit Sharing Research Foundation, Evanston, Ill., 1957).

2. *Corporate Trust Services*—Both Manufacturers and Hanover actively engage in providing corporate trust services. Each such service will be examined in turn.

(a) *Trustee for Securities Issues*—Based on number of issues, Hanover is trustee for 9.2% of bond issues held by all trust companies in New York City, ranking fifth. Manufacturers, with 5.4% of the total, ranks seventh. The merger would give the resulting institution 14.6% of the citywide total, and second place in New York City.

On the basis of number of corporations for which the applicants act as trustees, the impact of the merger would be somewhat less significant. Hanover now ranks sixth, and Manufacturers ranks eighth on such basis in New York City. The resulting institution would hold fourth rank, accounting for 12.5% of the total number of corporations represented.

Measured by the dollar amount (par value) of obligations issued and outstanding for which New York City trust companies act in a fiduciary capacity, Hanover accounts for 7.0% and Manufacturers for 4.4% of total value. The merged bank would account for 11.4% of the total value of such securities, holding fourth place in the City.

These figures, however, greatly overstate the probable effect of the proposed merger, since there is a national market for these services. While New York City banks, because of size, reputation and experience, attract large quantities of corporate trust business there are many institutions in other financial centers equipped to handle such business. The substantial size of the issuing corporations affords them their choice among corporate trustees.

The considerations reviewed above are supported by data indicating that in recent years banks outside New York City have trusteed over half of all new corporate bond offerings and municipal revenue issues. Of the 456 new trusteed securities issues totalling $11.6 billion marketed in 1960, Manufacturers and Hanover were named trustees of only 27, amounting to $288 million.

The combined institution would hold less than 7% of the total nationwide market.

(b) *Stock Transfer Agents*—In number of issues, Manufacturers now has 4.2% of all stock transfer agent accounts held by New York City banks, ranking seventh in this respect. The combined institution would hold sixth place with 7.7% of all such accounts.

The market area for transfer agent services is in part local and in part national. There is a local market in that companies whose stock is listed on the New York Stock Exchange are required to

use a New York City transfer agent. For these corporations, there are no competitive alternatives available outside of New York City. In this local market, the two banks combined represent only 8.5% of the issues traded on the New York Exchange. The merger would eliminate the competition of Hanover, holding 3.3% of the market. Almost two dozen other commercial banks in New York City offer transfer agency services, providing a wide range of alternatives. Finally, a corporation with offices in New York City may act as its own transfer agent, which some of the largest listed firms are doing.

In part, the relevant market area is nationwide, since securities traded on the American Stock Exchange or in the over-the-counter markets do not require a New York City transfer agent. Corporations whose stock is so traded can and do choose their agents from banks throughout the country. For example, at year-end 1959 more than 300 national banks outside of New York City reported that they held over 3,500 transfer agency accounts. If state-chartered trust companies outside New York City were included, the figures would probably reflect over 5,000 such accounts held by all banks outside New York City. While involving some duplication (reflecting the use of more than one transfer agent by the same corporation), the figures do suggest that banks throughout the country are able to handle such business, and have succeeded in obtaining a share. The combined institution would hold less than 3% of total accounts in the national market.

(c) *Registrar Accounts*—Hanover now ranks seventh in New York City as registrar for corporate issues, accounting for 6.2% of the citywide total. Manufacturers ranks eighth, with 4.5%. The merged bank would occupy fifth place among City banks offering this service, with 10.7% of registrar accounts.

As in the case of transfer agencies, issues traded on the New York Stock Exchange must have a New York City registrar. To this extent, there is a local market. In the local market, the merger would not be likely to result in substantial anti-competitive effects. The merged bank would hold a less than dominant position (with about 14% of the total), competition being provided by eight other New York City banks very active in the field, as well as by more than a dozen smaller New York City banks.

There is also a relevant market area which is national, since securities not listed on the New York Stock Exchange need not have a New York City registrar. At year-end 1959, more than 300 national banks outside of New York City reported that they held well over 3,000 registrar accounts, a figure which would be

increased to an estimated 5,000 accounts if state-chartered trust companies outside New York City were included in the computation. The merged bank would hold less than 3% of such national total.

(d) *Dividend Disbursing Agent Accounts*—Concentration in dividend disbursing business resulting from the proposed merger would not be significant. At present, Manufacturers accounts for 6.1% and Hanover for 3.3% of total accounts held by New York City banks. The share of the resulting institution would be 9.4%, making it the fifth largest dividend disbursing agent in the City.

(e) *Bond and Coupon Paying Agents*—Manufacturers is already the second largest bond and coupon paying agent in New York City, holding 21.1% of all such accounts in City banks. Hanover is the fourth largest, with 11.7%. The merged bank, with 32.8% of the total, would hold the City leadership in this service by a wide margin.

However, the relevant market area for these services is clearly national. About 83% of all issues for which Manufacturers acts as bond and coupon paying agent, and 90% of Hanover's issues, are drawn from outside the New York metropolitan area. Many banks throughout the country also act as paying agents. For example, national banks outside of New York City held almost 24,000 paying agent accounts, as compared to almost 28,000 held by New York City banks. If state-chartered banks outside New York City (for which no data are available) were included, banks located outside New York would be shown as holding substantially more in the aggregate than do the New York City banks.

Manufacturers has 8.4% and Hanover 4.6% of the national market, for a combined total of 13%. Numerous alternatives would continue to offer competition, including nine other New York City banks very or moderately active in this field (with 100 or more issues each), as well as hundreds of other banks elsewhere. In addition, the issuers themselves frequently act as their own paying agents so that even the latter percentages overstate the share held by the two banks.

1. *Foreign Services*—In the field of foreign or international banking services, the merger would have little competitive impact. Keen competition is provided not only by New York City banks (several with numbers of offices abroad) and foreign agencies, but also by large banks elsewhere in the country, and those in other major financial centers throughout the world.

2. *Municipal and Government Securities Activities*—In the

underwriting of municipals, the merger would have no significant effect, since Hanover does not engage in this activity. As regards government bond trading, neither bank is a dealer in such issues.

Duplication of Accounts

From a competitive standpoint, the significance of duplication of accounts lies in the circumstance that a merger eliminates a competitor servicing the same group of customers as the other bank, thereby reducing the ability of such customers to switch readily from one bank to the other, or to use both simultaneously.

There is some degree of duplication of deposit, loan and trust accounts between the two applicant banks. As indicated below, however, the merger would not have any significant adverse effects on competition for such accounts. Each of the banking services where duplication is most pronounced will be analyzed separately.

1. *I.P.C.* Demand Deposits*—Duplication with respect to demand deposits of individuals, partnerships and corporations, as measured by number of such accounts, would not be significant. Of over 500,000 accounts held by the two banks, less than 300 are held in common, and almost one-half of these belong to national firms with access to banking facilities anywhere in the United States.

Measured by dollar volume, Hanover has $231 million in deposit accounts of those individuals, partnerships and corporations which also carry accounts with Manufacturers. Over 80% of such duplication, by dollar volume, arises from accounts of national corporations.

Thus, most of the duplication of accounts is insignificant from a competitive standpoint, involving large customers with numerous banking alternatives. For the smaller deposit accounts, to the extent that these accounts do not relate to extension of credit by the bank (i.e., do not represent compensating balances), the market for deposits is a "seller's" (or depositor's) market. Since a depositor normally has numerous available alternatives among the several dozen New York City banks offering depositary services, no adverse competitive effects for such borrowers are anticipated.

As to common deposit accounts representing compensating balances, any adverse competitive forecast for such accounts would be predicated on the assumption that Manufacturers and Hanover are the sole banks willing to extend credit to these borrowers-depositors. This, however, is unlikely. If the local borrower,

* Individuals, partnerships, corporations.

albeit small, enjoys such financial standing that two large New York City banks are willing to lend money, it is also likely that such borrower could obtain similar accommodation from the merged bank, or from one or more of the several dozen other New York City banks.

2. *Commercial and Industrial Loans*—Measured by number, the two banks have 56 borrowers in common, out of a combined total of thousands of loan accounts. Of these 56 borrowers in common, 44 are national corporations. More than 90% of these loans, by dollar volume, are to national firms, which can and do use other credit sources. Supplementary data submitted by the applicants indicate that 49 of the 56 common borrowers have availed themselves of other bank or non-bank credit, or both, in addition to the credit extended to them by Manufacturers and Hanover. Such other borrowings far exceed in amount the loans outstanding from the two applicant banks. No significant unfavorable effect on such borrowers is therefore likely to result from the merger.

The number of smaller common borrowers is insignificantly small. Here also, since their credit standing had enabled them to borrow simultaneously from two large New York City banks, it seems likely that such borrowers would be able to secure credit in comparable amounts from the merged bank or from other New York City banks.

3. *Brokers and Dealers Loans*—Out of a total of over 150 such loan accounts, the two banks have eleven common borrowers. Borrowers in this category can and do obtain credit from numerous banks and non-bank lenders throughout the country, as is demonstrated by data submitted by the applicants. The merger, therefore, is not likely to affect unfavorably such common borrowers.

4. *Loans to Non-bank Financial Institutions*—The applicant banks have 23 such borrowers in common out of over 150 such loan accounts. The data supplied by the banks indicate that all such common borrowers are large institutions whose loans from Manufacturers and Hanover together aggregate far less than their loans from other banks. Their ready access to the national credit market, through banks and the sale of commercial paper, minimizes any adverse effect of the merger on such common institutional borrowers.

5. *Trust Services*—Only an insignificant number of trust accounts is held in common by the two banks. To illustrate, the applicants hold in common only two out of thousands of voluntary

trusts, two out of approximately 250 corporate trusts, and but a handful of agency accounts.

Branch Concentration

Hanover's principal office is at 70 Broadway.* Of its eleven New York City branches**, seven are within the midtown Manhattan area bounded by 34th Street on the south and 60th Street on the north.

Of Manufacturers' offices in the midtown area, seven are in close proximity (one to three blocks)† to the Hanover midtown offices mentioned above, and are within the local service areas of such Hanover branches. There are, however, anywhere from three to thirteen offices, representing a total of sixteen competing commercial banks (excluding Manufacturers), within two blocks of *each* of these Hanover branches. In most cases, numbers of savings banks and savings and loan associations are also in close proximity.

The above description of the incidence of branch concentration contemplates that for some retail banking services (savings deposits, consumer instalment loans, special checking accounts) the relevant geographical markets should be narrowed to areas of a few square blocks each, reflecting convenience of access to depositors and customers. In so circumscribing the markets, it clearly appears that the presence of a large number of banking alternatives in the area concerned would prevent any significant adverse competitive effects. Surrounded by competing institutions, the merged bank's branches in the affected areas would comprise part of a vigorous competitive pattern. Elimination of Hanover as a competitor in the midtown area would still leave all of the City's nine largest commercial banks, as well as many smaller commercial banks and other banking organizations, represented by branches in midtown Manhattan.

Within all of Manhattan, competition for the 54 branches of the merged institution would be provided by more than 250 offices of some thirty other commercial banks. It is noteworthy that none of the offices of either bank are proposed by the applicants to be closed, in the event the merger is approved, nor does the Department's study indicate that any of them should be closed.

In all of New York City, the approximately 21% share of City commercial banking offices to be operated by the merged bank

* Removal of that office to 40 Wall Street has been authorized by the Department.

** One of these being a limited office, at 20 Broad Street, Manhattan.

† In one case, within five blocks.

would not by any means dwarf the 13% to 17% share of such offices maintained by three other commercial banks in the City.

Accordingly, I would conclude that the additional branch concentration discussed above would not so impair competition in the relevant retail markets as to warrant disapproval of the merger.

Asset concentration, lessening of competition, and tendency toward monopoly, and the effects thereof upon the interests of the public

In reviewing bank merger proposals, the Banking Department recognizes the usefulness of concepts developed through judicial construction of the federal antitrust statutes. Such concepts are not to be applied, however, in disregard of the Department's unique supervisory experience in banking, and its familiarity with trade and competitive practices and patterns in the banking industry.

The Department considers and evaluates (against the background of its experience) the amount of competitive activity a proposed merger would eliminate, the consequent relative size and relative market power of the resulting institution, and the effects upon the public of any substantial reduction in the amount and quality of the remaining competition.

The Department's analysis of the present application reveals that in absolute terms (measured by the total resources of the institution to be absorbed) the merger, in eliminating The Hanover Bank, would eliminate a two billion dollar institution, holding 4.6% of all commercial banking assets in the City. Manufacturers Hanover Trust Company, the resulting institution, would be New York City's third largest bank (and fourth largest in the United States), holding 13.5% of commercial banking resources in the City. Clearly, while emerging as one of the City's largest banks in terms of resources (and the City's largest in terms of number of banking offices), the resulting institution would not dominate commercial banking in New York City or elsewhere; nor would the number of very large competitors be so reduced as to invoke the threat of monopoly or oligopoly in the major money markets. In New York City, six banks holding assets of between $1.9 billion and $8.1 billion each, would remain. Two of these banks would be larger than the merged institution. In addition, forty other remaining commercial banks in New York City each presently hold assets ranging up to approximately $700 million for the largest of this smaller class of institution. Outside of New York City, and throughout the United States, there would remain seven-

teen other commercial banks with over $1 billion in assets each. One of these banks would be larger than Manufacturers Hanover, and larger than each of the latter's competitors.

With respect to branch concentration, some 500 banking offices of almost fifty commercial banks would be competing in New York City with Manufacturers Hanover's 134 offices. In the savings deposit and real estate mortgage lending markets, many savings banks and saving and loan associations both in and outside New York City would also compete with the merged bank.

Total assets and total number of branches, while the most comprehensive, are not under all circumstances the most meaningful measures of the competitive power of a bank, or of the competitive impact of a bank merger.* It should be noted, however, that in absolute terms the proposed merger would be the largest consolidation in this Department's history of a bank's assets with those of another and larger institution. Nevertheless, in view of the number and strength of effective remaining competitors in all relevant markets, I cannot conclude that the contemplated asset concentration trespasses beyond limits consistent with effective competition.

With respect to the amount and vitality of surviving competition, it appears from the foregoing sections of this statement that the most significant quantum of competition that the merger would eliminate involves certain trust services, while only a relatively minor elimination of competition in depositary and lending services would result. In the latter markets (loans and deposits) the relevant market share presently held by Hanover in no case exceeds 3.8%.

Turning again to the trust services mentioned above, the merger would eliminate the following proportion of all such business transacted by all New York City banks: 7.3% for local voluntary and court trusts, 5.5% for the number of local profit sharing plans, 4.9% for local registrar agencies, and 4.6% for bond and coupon paying agencies. The total market share of such services to be held by the merged institution would not be excessive. Substantial non-bank competition (not embodied in the percentages cited here) exists, as well as competition offered by the significant number of remaining New York City banks, and in the national market by banks located elsewhere. This Department cannot conclude, under the circumstances, that the elimination of Hanover as a competitor in such markets would be injurious to the interests of the public.

* In the case of the recent Bankers Trust Company-The County Trust Company (New York Holding Corporation) bank holding company application, concentration of assets was a major consideration.

Finally, the question of overriding import, that of public interest and the needs and convenience thereof, must be considered.

The public interest and the needs and convenience thereof

Analysis in terms of the proposed merger's effect upon (1) availability to the public of bank credit, (2) the cost of such credit, (3) the availability to the public of other important banking services, and (4) the cost of such other services, affords a basis for evaluating the benefits to the public which may reasonably be expected to accrue.

Availability of Bank Credit

No substantial increase in the total credit available to the public is expected. While Manufacturers' ratio of loans to resources is considerably lower than that of other large New York City banks (44% as compared with an average of 51%), it does not necessarily follow that the merger would occasion, in the case of the resulting bank, any appreciably greater ratio of loans to assets than is now being extended by the applicants.

However, some additional competition in the market for very large loans may result, in view of the considerable differences between the present $24.4 million unsecured loan limitation for Manufacturers (and $18.6 million for Hanover), and a limit for the merged bank of $43 million. For secured loans, the merged bank's limitation would reach as high as $107 million. In this connection, it appears that both applicant banks now avail themselves of their present loan limits, as reflected by a number of loan commitments carried on their books in excess of 75% of present unsecured loan limitations. Such commitments, if fully drawn upon, would account for approximately one-third of all commercial and industrial loans of the applicant banks.

While perhaps not essential in meeting the needs of very large borrowers, the high loan limits of the merged institution would undoubtedly stimulate competition in the market for large loans, and would at least serve the "convenience" of such borrowers.

Small borrowers, particularly those requiring personal instalment loans, would benefit from the added convenience of availability of this consumer lending service at the offices presently operated by Hanover.

Cost of Bank Credit

No substantial effect upon loan rates in any category is expected. Loan rates for the consumer loans to be offered at the offices now

being operated by Hanover would be the same as the rates presently charged by Manufacturers. Such rates are competitive with those charged by other large banks offering consumer loans.

Availability of Bank Services

Both banks already provide a wide range of banking services. Nevertheless, the public could be expected to benefit through the contemplated expansion of "retail" banking facilities. At present, none of Hanover's Manhattan offices can be said to compete actively for this business, although all these offices are located in areas of demand for such services as special checking accounts, savings deposit accounts and consumer loans. While the public already is well served in such areas by offices of other institutions, the merger would undoubtedly enhance the convenience of the public through added availability of retail banking services.

Cost of Bank Services

The applicant banks pay virtually the same rates on time deposits, except for 90 day to 6 month domestic time deposits, where Hanover's rates tend to be higher. The applicants advise that the interest rates currently being paid by Manufacturers would be the same as the rates to be paid by the merged institution.

The effect of the proposed merger on the cost of trust and other miscellaneous services would be mixed, with some charges to go up, some down, and others to remain at their present levels. The proposed differences in fee schedules are quite small in virtually all instances.

It is concluded that the major advantages of the proposed merger to the public would result from higher loan limits, increased availability of "retail" banking services, and some probable increases in efficiency of operations, through operating economies and added depth in technical and management personnel.

SUMMARY AND DECISION

Data submitted by the applicants, and this Department's independent study, as reviewed in the foregoing sections of this statement, lead to these conclusions:

1. The considerations set forth in Section 10 of the Banking Law (and incorporated by reference in Section 601-b), including the technical banking factors of capitalization, liquidity, asset classifications, the premium proposed to be paid to the stockholders of Hanover, management classification and suc-

cession, and financial history, are either favorable, not adverse, or not precisely applicable.

2. The proposed merger would not expand the size or extent of the resulting institution beyond limits consistent with adequate or sound banking and the preservation thereof.
3. The proposed merger would not result in a concentration of assets beyond limits consistent with effective competition.
4. The proposed merger would not result in such a lessening of competition as to be injurious to the interests of the public, nor in such a lessening of competition as to tend toward monopoly.
5. The public interest would not be injured by the merger, and the needs and convenience of the public would be served to some extent thereby.

Accordingly, I approve the proposed merger of The Hanover Bank into Manufacturers Trust Company, and recommend to the Banking Board that it approve the operation and maintenance by Manufacturers Hanover Trust Company of the presently authorized domestic and foreign offices of The Hanover Bank.

The CHAIRMAN. Tomorrow we will have our meeting at 10 o'clock. There are two witnesses favoring the bill whose statements I understand will be brief. Then we will have three or perhaps four witnesses in opposition to the bill, and I want to give them all the time that they may need for the full presentation of their opposition.

To that end I have secured permission for us to stay in session all day if necessary, and we are not going to pull any 10-minute rule or any other kind of rule on the opposition to this bill. They are entitled to have their views considered, and I am going to see that they are recognized and have a full opportunity to present their views.

Thank you again, Mr. Clark.

We will stand in recess until 10 o'clock tomorrow.

(Whereupon, at 12:08 p.m., the subcommittee recessed, to reconvene at 10 a.m., Friday, May 21, 1965.)

AMEND THE BANK MERGER ACT OF 1960

FRIDAY, MAY 21, 1965

U.S. SENATE,
COMMITTEE ON BANKING AND CURRENCY,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS,
Washington, D.C.

The subcommittee met at 10 a.m., in room 5302, New Senate Office Building, Senator A. Willis Robertson (chairman of the subcommittee) presiding.

Present: Senators Robertson, Douglas, Proxmire, and Bennett.

The CHAIRMAN. The committee will please come to order.

We have a full schedule for today and we have some very fine and outstanding witnesses. We hope to have an opportunity to hear them all before the end of the day.

If the committee questioning carries on beyond the time the Senate goes into session, we can continue this afternoon, because no very important matters are before us on the floor, so I understand they will let us continue these hearings.

Our first witness is the superintendent of banking from a very great State—California. It maybe doesn't have quite the population of New York, but Los Angeles is pushing for first place on the basis of population.

Certainly the people of the Golden State can point with pride to San Francisco, where they have the biggest bank in the world and that means it is plenty big.

So naturally it is a great pleasure and honor for us to have with us the superintendent of banks of the State of California, the Honorable John A. O'Kane,

STATEMENT OF JOHN A. O'KANE, SUPERINTENDENT OF BANKS, STATE OF CALIFORNIA

The CHAIRMAN. Mr. O'Kane, does that mean your ancestors came from Ireland?

Mr. O'KANE. It certainly does.

The CHAIRMAN. Well, that is another great area. I am very fond of my Irish friends. I was privileged to visit there for a little while last fall, and I never got a better reception anywhere in Europe, and I never got better food.

I intended to go over there for the meeting of the Interparliamentary Union 2 weeks ago, but this more or less futile debate on the voting bill kept me here. I couldn't change it, but I was afraid to be away. At least if we were going to have 18 or 20 votes, I had to be 1 of them. So I didn't get over there, but I am going again sometime, because they are great people.

We are happy to have you, sir, and would you please sit down and tell us what you think of this legislation, the proposed bill.

Mr. O'Kane. I shall be pleased to do so, Senator.

Mr. Chairman, I appreciate the opportunity you have afforded me to comment on your proposed bill. It is an opportunity for me to make clear to the Congress my interest, as the California superintendent of banks, in a vitally needed clarification of the Bank Merger Act of 1960.

As you know, the establishment, branching, acquisition, merging, and other consolidating of California State banks is subject to my approval and, in the area of acquisitions, to the approval of the Board of Governors of the Federal Reserve System in the case of State member banks and the Federal Deposit Insurance Corporation in the case of State nonmember banks.

Both of these Federal agencies are called upon to review my approvals of such acquisitions within the terms of the Bank Merger Act and the criteria of that act are substantially those on the basis of which I grant or withhold those approvals.

It is vital to me, as it is to the Federal agencies, that such acquisitions are supported by my findings as to—

(1) The history and condition of the banks involved;
(2) The adequacy of any proposed capital structure;
(3) The future earnings prospect of the resulting bank;
(4) The character of its management; and, more particularly,
(5) The convenience and needs of the community to be served by that bank.

Last, but by no means least, I am called upon to determine the effect of such acquisitions on competition among the banks in my jurisdiction and among others operating within the State of California, including, as the Bank Merger Act enjoins, any tendency toward monopoly in that industry which the acquisition might promote.

Even in the absence of specific statutory standards to that effect, the veto of the Federal regulatory agencies on any State approval, based on these criteria, demands their full application at the State level.

It is probable that my interest in this area is more acute than in the case of other State superintendents by reason of the fact that California is the primary branch-banking State.

Its history and present status reflect the longstanding policy of the State to permit statewide branching, until today the California banking industry is composed of hundreds of banks of all sizes and character, from the largest bank in the world with branches in every county in the State down to the smallest and newest unit bank.

The Chairman. Does the Bank of America have 500 branches?

Mr. O'Kane. Over 870.

The Chairman. Thank you.

Mr. O'Kane. Probably nowhere else in the country are individual communities so well served by so many and so varied banking offices and this result has been accomplished not only by our branch banking policy but by a long series of bank acquisitions which, on the whole, have contributed to the health of the banking community and to its highly competitive nature.

You may conclude from this that I for one do not regard bank mergers as evil per se. Indeed, there have been many mergers in our

State which, history will show, have made a significant contribution to competition—and not at the expense of small banks, medium banks, new banks, or banks of particular financial interest or emphases.

In my relatively short tenure as superintendent, and I have been superintendent now for 3 years, I have been called upon to pass upon bank mergers and will undoubtedly do so again. That being so, I have a primary interest in the certainty of the Federal law in this area.

It is not merely from my own standpoint nor from the standpoint of the State banks which I regulate, but also from the standpoint of the banking industry at large which is so vital to the economy of California, that I am interested in certainly in this area.

It is, in my judgment, a distinct disservice to the industry to require the exhaustion of a long road of administrative and regulatory approval of a particular merger only to find, after such approval has been given, that the acquisition is subject to attack by another branch of the Federal Government either before the merger can be made effective or thereafter.

And on this last point I feel that blithe references to "unwinding" a bank merger—by divestiture of assets or otherwise—are indeed naive. A bank merger is not an industrial acquisition of a plant or of stock which can be merely sold off if found to be illegal.

The so-called unwinding of a bank merger, with the disposition of accounts acquired subsequent to merger, the challenge of State court fiduciary appointments, the rewriting of debenture obligations undertaken subsequent to merger and the rights of postmerger stockholders, involves problems the solutions to which are most difficult.

On the other hand, if the regulatory agencies have the final authority, the validity of the merger will be finally determined before it actually takes place.

As if these uncertainties were not enough, I may someday be called upon to charter a State bank made from the shattered remnants of a merged bank.

It is either the Comptroller of the Currency or I who must do this and the problems that would be presented to us would be staggering. No doubt they could be overcome but you will pardon me for inquiring whether they are necessary.

Moreover, I find it beyond understanding why the banking industry, one of the most highly regulated in American business life, cannot and should not be regulated in this matter of acquisitions by the same agencies which control other of its activities just as important as, and in many cases more so than, acquisitions. Certainly the establishment of a new bank may be of equal banking and economic significance, and fraught with more uncertainty, than is the merger of two banks, the history and operations of which can be spread on the record before the regulatory agency.

Finally, I find it difficult to see why the matter of competition, among all factors to be considered in an acquisition, has been so elevated that it alone may be the determining factor through the exercise of separate jurisdiction by a separate arm of the Federal Government. Certainly the antitrust policy expressed in the State and National laws is of importance and the furtherance of that policy is a continuing objective of business regulation in the State of California. But what of the other factors? Why are not our findings as to the adequacy of the capital structure of the resulting bank or the

character of its management subject to collateral attach by other, separate agencies? One can hardly avoid the implication that however competent we may be in passing upon the so-called banking factors, we are not to be trusted with the preservation of competition in banking even though we know that competition is the lifeblood of the industry we regulate.

My office is now formally involved in a bank merger now under attack in California, that of the Crocker-Citizens National Bank, the trial of which is scheduled in the U.S. District Court in San Francisco beginning June 1. The merger of Citizens National Bank of Los Angeles into Crocker-Anglo National Bank of San Francisco on November 1, 1963, was, of course, outside of my jurisdiction. I nevertheless had a real interest in that merger because of the position of those banks in the banking industry and economy in California and because of the effects which that merger might have had on the banks within my jurisdiction. That interest was made more formal when the Comptroller of the Currency solicited my opinion on the proposed merger and supplied me with a copy of the bank's application for his approval to merge. I reviewed that application and, in the light of my investigation and experience and with particular reference to the absence of any anticompetitive effects which the merger might produce, I recommended to the Comptroller that he approve the application. The report which I submitted to him reads as follows:

> In my opinion, the merger of these two noncompeting banks into one statewide banking institution, will place the resulting bank in a better position to furnish more effective competition on a statewide basis, thus serving the best interests of the citizens of California. The combined institutions, without lessening competition, would serve the convenience, needs and welfare of the communities of the entire State.
>
> The proposed merger, in my opinion, would be in accordance with principles of adequate and sound banking and in the public interest. Accordingly, it is my recommendation that you approve the application.

The Comptroller of the Currency, pursuant to the terms of the Bank Merger Act, solicited the advisory opinions of the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Attorney General of the United States. The FDIC, its Board of Directors being unable to agree, filed no opinion with the Comptroller; the opinion of the Federal Reserve Board was, by and large, favorable. Only the Department of Justice took a contrary position.

The Comptroller of the Currency held an extended public hearing on the application; in a lengthy opinion set forth in detail his findings with reference to all of the factors involved in the merger—the banking factors as well as that of competition—and approved the merger which became effective, as I have said, on November 1, 1963. Prior to that date, in October of 1963, the Department of Justice filed suit attacking the merger and requesting a special, three-judge district court to issue a preliminary injunction against its consummation. After hearing, the court denied the injunction motion and issued a unanimous opinion to the effect that the Government had failed to present even a prima facie showing that the proposed merger would constitute an inhibition of actual or potential competition in commercial banking in any relevant market. (See p. 446.)

In effect, what we had here were determinations, unofficial on my part but official on the part of the Comptroller of the Currency and

the U.S. district court, that the merger was in the public interest. Since that time, I have observed the justification of those findings. Not only has the merger provided the business community of the State and Nation, and the government of California itself, with an additional source of banking services by a bank with facilities in both major population centers of the State—in real competition with the three banks which, prior to that merger, were the only banks with such facilities—but in nowise has the merger had a deleterious effect upon the banking structure of the State. The merged institution is an additional medium through which the financial resources of the State can be funneled to areas of need—a matter of primary importance to California which, unlike eastern areas, is a capital deficit region. At the same time, there has been no inhibiting of the establishment of new banks nor of the growth of smaller banks, either local or regional.

In my judgment, this merger has so proved itself to be in the public interest that, even assuming it to have anticompetitive effects in its wake, they have been so far outweighed by the benefits to the State economy that the approval of the merger is completely justified. It should also be noted that not only does this merger provide effective competition with the other three statewide banks but that, should it be rescinded, the exclusive access of those three banks to banking customers—either in California or elsewhere, who desire to deal only with a bank with statewide facilities—would be preserved for all time to those three banks, including the United California Bank and the First Western Bank whose present positions with statewide facilities were created by a consent decree approved by the Department of Justice. As I will later state, any new banking system with facilities in both the San Francisco and Los Angeles metropolitan areas cannot practically, within the foreseeable future, be established by means of de novo branching. No statewide system in California has ever been established other than by the process of bank acquisitions. In short, it is more than probable that if Crocker-Citizens is destroyed, no other statewide banking system will ever be created in California—a result far more undesirable than any possible anticompetitive effects of the Crocker-Citizens merger.

Despite all these considerations, the Department of Justice persists in asserting the merger to have been, and to be, in violation of the antitrust laws of the United States. The Department apparently is not impressed with my finding, and that of the Comptroller of the Currency, that the participating banks were not to any substantial degree competing with each other and that therefore their merger could not inhibit actual competition. The Government theory on this score appears to be that there is a statewide market for banking services in which the merging of these banks constitutes an undue concentration. I am not aware that our entire State constitutes a banking market in which, of necessity, every bank competes with every other bank and to which every banking customer in the State could turn for alternate sources of banking services. I consider a banking market in which the legality of a merger should be tested to consist of either the typical local service area of a banking office on the one hand or a market which is national in scope on the other. In a nutshell, I do not think that any banking customer in the State of California would have regarded Crocker-Anglo and Citizens

National as alternate sources of bank credit or other banking services unless that customer had, at the same time, the opportunity of securing such banking services outside the State of California.

So unrealistic is this approach that I understand the Government is now grounding its attack upon the theory that, in absence of the merger, Crocker-Anglo and Citizens, sometime in the vague future, would have branched into each other's territory. This contention with respect to potential competition, in my opinion, ignores the history of those banks and the realities of California banking. The potential competition point was thoroughly reviewed and disposed of by the Comptroller of the Currency and was considered by the district court in its hearing on the preliminary injunction. From my point of view, even if there is any substance to the argument, it is essential that the State of California have the immediate benefit of new competition among statewide banks and not be required to wait for such competition to be introduced by branching—a process which may take from 10 to 20 years to produce that kind of valuable competition in our banking industry.

More important, the position of the Department of Justice here represents a basic conflict of policy regarding the establishment of new banks and new branches by existing banks with the policy of the State and Federal regulatory authorities. Apparently it is the view of the Department of Justice that another statewide system, or systems, should have been created by these two banks by the establishment of new branches. This policy, however, runs contrary to the desires of both State and Federal supervisory authorities to encourage the establishment of new banks and new branches in appropriate areas. Thus, 101 new banks were established in California between January 1, 1960, and December 15, 1964, and the Comptroller of the Currency in his decision on the merger of Crocker-Anglo and Citizens stated that "it would seriously overbank" the area to grant Crocker-Anglo the permits necessary to establish a statewide system.

There are also other areas of conflict or differences of opinion be tween the Department of Justice and the supervisory authorities. The Department of Justice does not recognize basic changes in banking markets which have occurred since World War II. In that regard, the Governor of the State of California, Governor Brown, appointed a banking study committee, of which the chairman was Allan Sproul and of which I was a member. In that report, dated January 26, 1965, we stated (pp. 22–23):

It is in the area of competition between banks and other financial intermediaries, however, that we see the greatest need for a reexamination of public policy and legal interpretations of public policy. In passing upon these matters, the regulatory authorities appear to have considered, and in some cases the courts have so ruled, that banking is a unique line of commerce and does not share essential features with other financial institutions, and that the relevant market of banks in some restricted geographical or trading area within which a concentration of power leading to a lessening of competition can be isolated by assembling figures of bank deposits and bank loans.

The fact of the matter is that, while banks do have the unique characteristics of providing the community with a payments medium, they are no longer engaged in a unique line of commerce. Banks and other financial intermediaries are enmeshed in multiple, direct, and fierce competition. Savings and loan associations, savings banks (in some areas), financial companies, life insurance companies, pension funds, and even corporate treasurers are all actively engaged in some part or parts of the line of commerce inhabited by banks. And the relevant market is a misnomer—the areas in which banks and other financial

intermediaries may compete for business varies from place to place and customer to customer. It may range from a neighborhood business district, a town or city, or a county or regional area, to the entire State or Nation—and beyond our national borders, there is competition among banks and with foreign institutions.

If what public policy demands is the prevention of "tendencies toward monopoly" and protection against a "lessening of competition," we shall need a revision of law, a change in enforcement attitudes, and a reexamination of supervisory rulings. These actions will recognize that we are moving away from a fragmented banking system made up of thousands of individual unit banks restricted in their operations to small geographical areas (and, perhaps, in some instances, exercising monopolistic powers in those areas), and that we are no longer dealing with a banking system, the unique characteristics of which preserve it from the most vigorous competition of other financial institutions. If the essence of competition (that is, a choice of alternatives for the purchasers of a service) is to be preserved and if the banking business is to be able to adapt its structure and its performance to the requirements of a growing and changing economy and to maintain the necessary strength in competition with other financial intermediaries, these outworn concepts of the nature of our economy, and of its financial institutions, will have to be brought into conformity with the real world.

The Department of Justice does not, however, accept this view of financial markets.

My interest in the Crocker-Citizens merger and its litigation has been further evidenced by my request to the Department of Justice for its consent to the State's intervention in this suit. We have prepared and intend to file a brief amicus curiae in the matter despite the fact that my request for the Department's consent has not been acted upon.

In summary, I believe that your bill, Senator Robertson, should be passed for the following reasons:

1. As set forth in the Bank Merger Act, the competitive effect is only one of several factors which must be considered in bank mergers. Permitting an independent attack on mergers by the Department of Justice overemphasizes the competitive factor.

2. State and Federal banking authorities control the chartering of new banks and new branches. These activities have as much, or more, influence on banking markets and the extension of banking services as do mergers and all are interrelated. It seems only reasonable, therefore, that the authorities which are experienced and accustomed to dealing with a large part of the problem should have the final responsibility for the entire picture.

3. Leaving only the competitive aspects of selected bank mergers to be handled on a case-by-case basis in the courts is inconsistent with the development of a sound banking structure, particularly where policies of the Department of Justice do not coincide with those of the regulatory authorities.

4. It appears arbitrary and capricious to require banks to process mergers first through one branch of the Government and then another, with the possibility of different results.

5. Final and prompt determination of the validity of bank mergers by regulatory agencies eliminates problems raised by divestiture proceedings.

The touchstone here, it seems to me, is the public interest and how it best may be served. In my judgment, the 1960 intent of Congress, as I read it, was that the public interest would be best served by the considered and knowledgeable action of the regulatory agencies best equipped to pass on these matters. That intent can be clarified and reestablished by the bill now before your committee.

The CHAIRMAN. Mr. O'Kane, after listening to your statement, which is based not on what somebody has written in a book, not on some scheme that you dreamed up on a vacation sometime when you didn't have many other things on your mind, but based on day-after-day contact with 170 State and National banks in a great State, I can't understand why your distinguished banking colleagues from the great State of California who have heard your statement don't just stand up and say to me "Frankly, we had intended to oppose your bill, but after hearing O'Kane, we will have to admit he was right."

Mr. O'KANE. Thank you, Senator.

The CHAIRMAN. Mr. O'Kane, do you favor competition in banking?

Mr. O'KANE. I certainly do.

The CHAIRMAN. From the viewpoint of the community?

Mr. O'KANE. Yes, I do.

The CHAIRMAN. And business borrowers?

Mr. O'KANE. That is correct.

The CHAIRMAN. And personal borrowers?

Mr. O'KANE. Yes, sir.

The CHAIRMAN. And depositors?

Mr. O'KANE. Yes.

The CHAIRMAN. And bank employees?

Mr. O'KANE. Yes, sir.

The CHAIRMAN. And bank stockholders?

Mr. O'KANE. Yes, sir.

The CHAIRMAN. All right. Now, if two State banks in California wanted to merge, would you look into all of those factors before you gave them your approval?

Mr. O'KANE. We would look at the entire picture. We would take the banking factors and we would examine the competitive factors and then we would wrap up the entire package, either with an approval or a denial in the public interest.

The CHAIRMAN. And being opposed to monopoly, if you thought the merger would create a monopoly, and be against the interests of these various groups I mentioned, you would turn it down?

Mr. O'KANE. The application would be denied forthwith.

The CHAIRMAN. And if you denied it, that would be the end of it?

Mr. O'KANE. This is correct.

The CHAIRMAN. But if you approved it, and they were member banks, then they would go up to another fine group known as the Federal Reserve Board?

Mr. O'KANE. I have a great deal of respect for the Federal Reserve Board.

The CHAIRMAN. And so do I. I never heard of any member of that Board being accused of favoring monopoly.

Mr. O'KANE. Neither have I.

The CHAIRMAN. Then I understand you say that after we have gone through this long, tedious road of securing approval at the State level and the national level, you think it ought to end there?

Mr. O'KANE. I definitely think that way, Senator. I think we should have this confusion and chaos removed from this area.

The CHAIRMAN. You may not know it, but I entered State politics in 1912, as a delegate to a State convention for Woodrow Wilson. Well, there were two things about Woodrow Wilson that I greatly

admired. One of them was he was against monopoly in big business, and was determined to pass antimonopoly laws, which included the Federal Reserve Act, so that the New York banks—with all due deference to New York—couldn't break the back of the rest of the country from a financial standpoint.

You remember the big banks went up one side and down the other on that act, because they had a monopoly and they didn't want to give it up.

The next thing I liked about Woodrow Wilson was he wanted to preserve the private enterprise system and he said:

> I don't want a smug lot of experts to be sitting down behind closed doors in Washington and playing providence to me.

Well, I feel the same way about it. Let's break up monopoly on one hand, but let's have private enterprise on the other hand.

So, one of the first problems in monopoly that got me—I was known as a red-hot sort of liberal in those days—a friend of mine had a little iron business in Roanoke, Va., just 50 miles away, and he made culverts and bridges.

We didn't have very many road laws in those days—incidentally, I sponsored a road act in Virginia in 1920, under which the first State highway was built, 1920.

United States Steel Corp. tried to buy my friend out and he said, "No, I am doing too well, I am not going to sell." So, what did they do? They came in there and they undersold him until they put him into bankruptcy, deliberately undersold him in the entire area he served and put him out of business. Then they bought that little company and put the prices up again.

Now that is what I call monopoly pressure. That is very bad and I am very much opposed to it.

We had a witness here yesterday that said one of your California banks competed in New York. Is that true? Now, we recognize the Bank of America competes in New York.

Mr. O'Kane. Not only the Bank of America, that is a national bank, but I will put in a plug for my State banks; First Western Bank and United California Bank, which are regulated by me, both compete in the New York market.

The Chairman. There is a great bank in Chicago. Chicago is not as big as New York or Los Angeles, but they have a bank called the First National there. I have seen ads that say they make loans in California. Is that right?

Mr. O'Kane. That would be correct.

The Chairman. Do they compete out there?

Mr. O'Kane. They do; yes, Senator, and this is fierce competition.

The Chairman. A few years ago we had before this committee a criticism of an RFC loan for a man named Henry Kaiser. They loaned him money to start a steel plant at a place called Fontana. It was a pleasing name but frankly I had never heard of it before. But I believe that is not too far from the great metropolis of Los Angeles.

Mr. O'Kane. That is correct.

The Chairman. And they said it is going to cost you $2 and $3 a ton more to manufacture steel at Fontana than it does at Pittsburgh. You are in a higher labor area and you are far from some of the major sources of raw material.

He said that is all right, but it will cost United States Steel and Bethlehem so much freight to ship their steel from Pittsburgh that I can compete.

He did compete, didn't he?

Mr. O'KANE. He certainly did.

The CHAIRMAN. And Fontana now is a going concern, thanks to the RFC loan, and they are competing now with the giants, which I said at one time put a little steel company out of business near my hometown, which really came close to me.

How much does it cost the Bank of America to ship a million-dollar loan to New York City?

Mr. O'KANE. Well, I think it would cost the amount of the wire transfer of the funds to the Federal Reserve and in this respect I think it is for free, as part of the service.

The CHAIRMAN. They could do it with a 5-cent postage stamp; couldn't they?

Mr. O'KANE. That is so. They can do it faster than that, Senator, by transferring the funds by wire.

The CHAIRMAN. I have heard about transferring funds by wire. It seems that some shrewd savings and loan man had some funds in a bank that got a little shaky, and he transferred his money out by wire and he was the only one that got it out. I heard about that; yes.

All right. Now we come to your testimony, not based on what some professor said or on some pipedream, but on your own personal observations. You told us when this Crocker-Anglo Bank was going to merge, that you thought that would be good for competition?

Mr. O'KANE. That is correct, Senator.

The CHAIRMAN. All right. You say you watched it after the merger took place and it was good for competition?

Mr. O'KANE. That is correct.

The CHAIRMAN. The Justice Department tried to get an injunction to prevent the merger, and a three-judge court turned them down?

Mr. O'KANE. True.

The CHAIRMAN. But they are not satisfied, they want to break it up.

Mr. O'KANE. Unscramble it, right.

The CHAIRMAN. Well, I don't know. They were national banks. I reckon if they break it up that will be the Comptroller's problem.

But suppose it is a little bank in your State. If they give you the shattered and broken remnants—that reminds me of Daniel Webster when he said "When mine eyes shall be turned for the last time to behold the sun in heaven, may I not see it shining on the broken and dishonored fragments of a once glorious Union; on States dissevered, discordant, belligerent; on a land rent with civil feuds, or drenched, it may be, in fraternal blood."

Now you say you don't want the problem of taking over a shattered State bank that didn't get any new electronic equipment, didn't have the new building, and you have to give it a charter.

Mr. O'KANE. That is right. The problems would be staggering.

The CHAIRMAN. Can the Federal court give them a charter?

Mr. O'KANE. No.

The CHAIRMAN. Of course not. That makes a little problem. But if we don't pass this bill, we now freeze several banks that have already merged that the distinguished Attorney General has given his blessing to. We freeze them into a monopolistic position, but

nobody else can come in unless he says, well, boys, it is a little doubtful, but I will let you get by, but nobody else better ask for it.

You say you don't believe in that?

Mr. O'KANE. I don't believe in freezing the picture at all.

The CHAIRMAN. Well, you have testified and made it perfectly clear that, on the basis of your experience supervising California State banks—and there are 170 banks in all in California, one of them the biggest of all the banks—you think small banks can exist in competition with big banks?

Mr. O'KANE. Very definitely, and there is a place for the small bank.

The CHAIRMAN. And you have areas in California where local monopolies—by any chance would one of those monopolies be an independent bank? I hope not, of course.

The Chair recognizes the Senator from Illinois.

Senator DOUGLAS. In view of the fact that we have had 2 days of testimony by witnesses in favor of the bill, and we have now the testimony of Mr. O'Kane, and there is another witness to come to testify in favor of the bill, that leaves only a small amount of time for the opponents.

So, I will waive any questions.

Senator PROXMIRE. I will just ask a few questions.

Mr. O'Kane, what percentage of total banking assets in California does the Bank of America have?

Mr. O'KANE. I don't have the exact figure on that, Senator, but let us say $15 billion in total assets as of the moment. And this is right off the top of my head, out of, let us say, $37 billion in total assets for all banks in the State of California. This is both National and State banks.

Senator PROXMIRE. So it is around 40 percent?

Mr. O'KANE. That might be correct.

Senator PROXMIRE. In San Francisco, I take it the big bank had 58 percent of the assets in 1960, one bank, is that right?

Mr. O'KANE. That could be.

Senator PROXMIRE. And the five biggest banks had 92 percent of the banking assets?

Mr. O'KANE. I don't know as to the accuracy of that figure.

Senator PROXMIRE. It sounds about right?

Mr. O'KANE. Yes.

Senator PROXMIRE. In view of this situation, it seems to me that the effect of passing the Robertson bill might be—and again, I say I haven't decided one way or the other on this bill yet—one effect of passing this bill and taking the banks out from under the antitrust law, and knocking out the Attorney General, except in an advisory capacity, might have the tendency at least to increase concentration?

Mr. O'KANE. I don't think so, Senator. I think that when you look at the whole picture as I have stated it, the banking factors and, of course, the competitive factors, when you weigh each of these factors individually as you must, and then as a full package, I think the result that emerges is in the public interest.

Senator PROXMIRE. On page 3 of your statement you say that these mergers are not at the expense of small banks, medium banks, new banks or banks of particular financial interest. What I am afraid of is this tends to be the view of people in your industry, and I don't say

this critically, I think it is a fine industry, but it is a perfectly natural and understandable view.

I think the independent bankers themselves might take the same view. They may be concerned primarily with the effect of diminishing competition on themselves.

But Justice Brennan pointed out in the *Philadelphia* case, very well I thought, that these mergers may have a beneficial effect on all banks, but still have an adverse effect on the competitive picture, because it is not the banks that should concern us primarily, but the public, the bank's customers, the public interest.

Isn't it possible that you might take the view, and recognize as one who is dealing constantly with banks, and who is responsible for the health of the banking system, who is anxious to do all you can to protect it and to give them every legitimate proper advantage, that you might lose sight of the interest of the customer, who wants a diversified banking system?

Mr. O'KANE. No; I don't think this situation occurs, at least in the State banking department in the State of California. I would think that it is not our view to give the banking system whatever they might want. I think that if you do this, you have no regulation at all.

Our banks are strictly regulated in accordance with statutes, both State law, on State member banks, or nonmember insured banks. They are held to the line, both on the provisions of the Federal law and the laws of the State of California.

So I don't think this tendency would be present.

Senator PROXMIRE. It is exactly because the banks are protected against the adverse impact of competition, by all of the regulations, requiring adequate capitalization and examination of assets and limiting the kinds of assets you can have. It is because you are insulated in this way and because you have the responsibility for providing that kind of supervision. This is the very reason why it seems to me that we can give more weight to competition, perhaps more vigorously in banking than in any other industry.

Mr. O'KANE. That is correct. Among the banks themselves the competition is——

Senator PROXMIRE. Yet you say in your testimony, as Governor Martin said in his, that there are cases where competition should not be the primary consideration in considering mergers. In other words, it may diminish competition; yet the merger should be approved.

Mr. O'KANE. I wouldn't overlook the competitive factor in any case.

Senator PROXMIRE. What was that again?

Mr. O'KANE. I would not overlook the competitive factor.

Senator PROXMIRE. I understand that. But you would nevertheless feel the other factors would overbalance it?

Mr. O'KANE. I would give whatever proper weight, in my judgment, should be given to any of the factors and in the whole package decide the application.

Senator PROXMIRE. See, this is a case of not having—I wouldn't say having the "fox guard the henhouse," because I think you gentlemen have a fine record of concern for the public. But, nevertheless, you do have that particular concern for the banks; that is your duty, that is your job, these are the people you see and work with, rather than the borrowing public.

I am concerned—on page 5 you say:

Certainly the establishment of a new bank may be of equal banking and economic significance, and fraught with more uncertainty, than is the merger of two banks.

In other words, I get the feeling—and maybe it is very unfair—that you view with considerable apprehension the chartering of a new bank, the entry of a new bank, and just as you perhaps feel that might be as great a danger as the merging of two banks, or greater danger.

Mr. O'Kane. In this connection, Senator, the most important feature in chartering a new institution is management. And where you have a merger of two institutions, you have proved management, in both banks, so that you don't have that difficulty in appraising someone who is proposed to head it up.

Senator Proxmire. That is an excellent statement. It makes all of the sense in the world. That is right. And see, this is the factor that tends to promote a situation in which we have more restaurants, motels, gas stations, many, many more than we had 20 years ago, but practically the same number of banks.

In your case in California, you have a few more, I guess. Wasn't there an increase in the last 10 or 15 years?

Mr. O'Kane. Oh, yes, quite an increase.

Senator Proxmire. But nothing like the increase in the general economy?

Mr. O'Kane. In the economy of California, yes. I think it is commensurate with the growth and development of the State of California. I don't, and I can say this positively, I don't believe there is any area in California that is either underbanked or overbanked.

Senator Proxmire. There has been a 100-percent increase in the GNP in California in the last 20 years, 60-percent increase in employment, 80-percent increase in population. How much an increase in banks?

Mr. O'Kane. The banks approved by the Comptroller—national banks—went up from 1960, 100 percent——

Senator Proxmire. What went up?

Mr. O'Kane. National banks went up from 45 to 90 banks in the State of California, and State banks went up from 78 in 1962 to 104 banks at the end of 1964.

Senator Proxmire. These are independent banks?

Mr. O'Kane. Yes.

Senator Proxmire. I am not talking about branches. I am talking about the number of independent banks.

Mr. O'Kane. I am talking about individual banks, Senator. This is in number of banks. National banks went from 45 to about 90.

Senator Proxmire. You have a greater absolute increase in the number of banks in California than all of the rest of the Nation combined?

Mr. O'Kane. This is correct. But if you check out the applications, you will find that the per office-per population ratio is proper.

Senator Douglas. Mr. Chairman, I think there must be some confusion on this matter, because I hold here in my hand a report on the Governor's Banking Study Committee, and on page 47 of that study it lists the number of banks in California, by years, from 1945 to 1964.

In 1945 the number of national banks was listed as 91. In 1964, 71, a decline of 20. And State banks, 97 in 1945, and 99 in 1964, an increase of only 2.

Now, it is true there may be more branches, but the number of banks actually diminished.

Senator PROXMIRE. Yes. This was my question. Not the number of branches, the number of independently owned, separate, distinct banks.

Mr. O'KANE. Now, the figures I have—and these are most current. Let's take the year 1961. There were 40 national banks in the State of California. In 1964 this increased to the present figure of 90. For the same period——

Senator DOUGLAS. Just a minute.

Senator PROXMIRE. As of June 30, 1964, on this chart, it says 71 national.

Mr. O'KANE. This is as of the year ended 1964.

Senator PROXMIRE. That would mean it declined by one since 1945. In 1945, 91 banks; in 1954, at the end, there were 90. So it is a loss of one over a period of 20 years, and the economy has been developing.

Mr. O'KANE. Well, there have been many aquisitions.

Senator PROXMIRE. Oh, yes. I don't say there haven't been new banks chartered. But my point was the overall effect, the number of banks now compared with 20 years ago. The answer is you have fewer national banks and about the same number of State banks.

Mr. O'KANE. That could be correct, yes.

(The table previously mentioned follows:)

TABLE 9.—*Banks and branches—Number in operation, all insured commercial banks, California, 1945–65*

Year	Banks		Number maintaining branches		Branches		Total number of banking offices		
	National	State	National	State	National	State	National	State	All
1945	91	97	10	22	728	162	819	259	1, 078
1946	92	95	9	22	714	165	806	260	1, 066
1947	94	95	10	24	720	175	814	270	1, 084
1948	94	93	13	26	735	181	829	274	1, 103
1949	94	101	13	27	758	190	852	291	1, 143
1950	93	98	16	29	776	202	869	300	1, 169
1951	93	97	19	30	793	210	886	307	1, 193
1952	92	97	19	31	783	216	875	313	1, 188
1953	90	107	21	35	797	224	887	331	1, 218
1954	73	89	22	29	823	260	896	349	1, 245
1955	57	83	19	32	870	301	927	384	1, 311
1956	49	83	19	34	944	320	993	403	1, 396
1957	48	74	18	34	1, 014	331	1, 062	405	1, 467
1958	46	73	17	36	1, 074	349	1, 120	422	1, 542
1959	37	73	17	39	1, 140	371	1, 177	444	1, 621
1960	40	72	20	40	1, 233	395	1, 273	467	1, 740
1961	40	77	20	43	1, 310	432	1, 350	509	1, 859
1962	45	78	21	43	1, 437	481	1, 482	559	2, 041
1963	54	95	24	49	1, 543	533	1, 597	628	2, 225
1964 [1]	71	99	27	55	1, 588	561	1, 659	660	2, 319
1965 [2]	90	104							

[1] As of June 30, 1964.

[2] From "Report of the Governor's Banking Study Committee on the Future of Banking in California," January 1965. Figures for Jan. 1, 1965, from Mr. O'Kane's testimony.

Source: Adapted from "Annual Summaries," Federal Reserve Bulletin.

Senator PROXMIRE. Fine.

Now, you argue on page 9 (p. 131, above) if you hadn't gone ahead with this merger, which was disapproved by the Department of Justice, that there was no other statewide banking system that could be established. We don't have any statewide banking system in Wisconsin. There is none in Illinois. There is none in many of our States that are very heavily developed and are progressing economically.

Why do you need a new one in California?

Mr. O'KANE. I would think the tendency in the State of California, following our branch-banking principle, is to have more such outlets. This is particularly true in the national market and in the offering of banking services throughout the State. It is desirable to have an office of a bank such as the Bank of America has in every county in the State of California.

The same principle would go for my State-regulated institution, United California Bank. They are continually expanding in areas to provide further banking services and to build what is a requisite for California; namely, statewide institutions.

Senator PROXMIRE. This is the same chicken-and-egg thing. You build a statewide banking system, then you get statewide chainstores, statewide retail outlets of various kinds, in a phrase, statewide economy concentrations.

My concern is that when you build a big multi-billion-dollar, statewide banking structure, you encourage multi-million-dollar industry and economic concentration generally, not simply the effect of the bank, but the effect of permitting this kind of merger and this kind of development on the whole business structure, the whole economy.

Mr. O'KANE. The needs of California are such that we need bigger banks, and in areas we need the small bank, the medium-sized bank, to keep competition alive.

But the demands of commerce and industry in the State of California requires that we have at least another alternative institution, such as Crocker Citizens, with its $3 billion in total assets. This accommodates the individual needs of large customers who have tremendous demands for credit. The little bank couldn't do it, Senator, without participation by dozens of other small institutions.

But, these are all good banks, and I would hope, and I look forward to seeing the State of California have more statewide institutions. This is our law; this is our philosophy; this is the way we want to go. Under the philosophy of the dual banking system California has just as much right to have statewide branching as Illinois has to have no branches at all. We want to preserve the right of any person having the background and the reputation and the know-how, and where the public interest warrants it, and we haven't been—

Senator PROXMIRE. What you are telling me is very significant, I think. Here is a State which is perhaps the biggest State in the Union, which has been for years, as you say, the leading State in branch banking, and you are telling me you believe in more of this statewide operation and you told us in your testimony the only way you could do it was by merger. You said you can't do it de novo. You have to do it by merger. And this means the position you are taking is you are going to have a lot more mergers in California.

Mr. O'Kane. This could happen.

Senator Proxmire. Unless the Department of Justice is given the authority, or retains the authority it has at the present time.

Mr. O'Kane. This could happen. But we are talking about——

Senator Proxmire. I just say it is a very revealing and an important consideration for this committee.

Mr. O'Kane. It would be a fine thing if we could have another State bank immediately. But this couldn't be accomplished immediately by way of de novo branching. It would have to be by way of acquisitions.

Now, I don't favor the acquisition route especially. If it were possible to branch de novo, this would be desirable.

Senator Proxmire. Thank you very much.

Thank you, Mr. Chairman.

The Chairman. Off the record a moment.

(Discussion off the record.)

The Chairman. Our next witness is the head of not only one of the most successful bank holding companies in the Nation, but chairman of the national organization. We have in the audience a man who has rendered a lot of assistance to me in putting through the bank holding company law. For 18 years, Members of Congress, including my predecessor, tried to get through a bank holding company law and they never could succeed. But, finally we were able to get through a law.

We are happy to welcome here the head of Marine Midland Corp. and the head of the Association of Registered Bank Holding Companies, Mr. Baldwin Maull.

STATEMENT OF BALDWIN MAULL, PRESIDENT, ASSOCIATION OF REGISTERED BANK HOLDING COMPANIES, AND PRESIDENT, MARINE MIDLAND CORP.; ACCOMPANIED BY DONALD L. ROGERS, EXECUTIVE DIRECTOR, ASSOCIATION OF REGISTERED BANK HOLDING COMPANIES

Mr. Maull. Thank you, Senator.

Mr. Chairman, I am Baldwin Maull, president of Marine Midland Corp., Buffalo, N.Y. I am appearing here today as president of the Association of Registered Bank Holding Cos. Accompanying me is Donald L. Rogers, executive director of our association.

The association represents 24 bank holding companies registered with the Federal Reserve Board pursuant to the Bank Holding Company Act of 1956. A list of the association's officers and directors is attached to this statement.

We appreciate this opportunity to present our views in support of S. 1698, which was introduced by the committee chairman and is popularly called the Robertson bank merger bill.

PROVISIONS OF THE BILL

Senator Robertson's bill would amend section 18(c) of the Federal Deposit Insurance Act (often called the Bank Merger Act) to exempt from the provisions of the Sherman Antitrust Act and the Clayton Act any merger, consolidation, acquisition of stock or assets, or assumption of liabilities (hereafter referred to as a merger) by an

insured bank, which has been approved by the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation. The bill would also exempt from the antitrust laws any merger by an insured bank consummated prior to May 13, 1960 (the effective date of the Bank Merger Act), which had been approved by the appropriate State or Federal bank supervisory authority.

HISTORY OF MERGER ACT

When the Bank Merger Act was enacted 5 years ago, it was generally agreed that the Sherman Act applied to bank mergers. However, it was considered very difficult to prove that a bank merger violated the Sherman Act, and there had been no court interpretation of the act's application to banks.

Similarly, it was recognized that the Clayton Act applied to bank mergers accomplished through the acquisition of stock, but did not apply to banks merged through the acquisition of assets, Since bank mergers are invariably asset-acquisition transactions, bank mergers were considered for all practical purposes to be exempt from the Clayton Act.

Thus this committee and the Congress approved the 1960 merger legislation on the assumption that the antitrust laws did not effectively apply to bank mergers. I shall not burden this record with all the many citations to prove this point, but the evidence is overwhelming. (For example, S. Rept. 196, 86th Cong., pp. 1–3; H. Rept. 1416, 86th Cong., pp. 5, 9; hearings on S. 1062, Senate Committee on Banking and Currency, May 18, 1959, pp. 9–10 (Attorney General Brownell), pp. 93–94 (Congressman Celler); hearings on S.1062, House Committee on Banking and Currency, Feb. 18, 1960, p. 162 (Assistant Attorney General Bicks).)

Obviously, if the antitrust laws were fully applicable to bank mergers, there would have been no need to pass a duplicating statute such as the Bank Merger Act.

Subsequently, in the 1963 *Philadelphia* case (*U.S.* v. *Philadelphia National Bank*, 374 U.S. 321) and the 1964 *Lexington* case (*U.S.* v. *First National Bank and Trust Company of Lexington et al.*, 376 U.S. 664) the U.S. Supreme Court held that both the Clayton Act and the Sherman Act apply to all bank mergers regardless of how they are accomplished.

PUBLIC POLICY CONSIDERATIONS

When the Congress considered what should be the national policy as to bank mergers and competition, it could have simply passed legislation stating that the Sherman and Clayton Acts applied to all bank mergers and then left it up to the Attorney General to enforce the law.

But the Congress did not choose this approach. Instead, it wisely recognized (or so we in the banking industry thought) that banking, like the insurance and transportation industries, was a special sort of industry, having regulated entry and partially regulated prices; that the industry already was subject to the jurisdiction of numerous supervisory authorities; that its power to expand by de novo branching, when permissible at all, was exercisable only after approval by

these same supervisory authorities; and that banking competition needed curbs at both ends of the spectrum, so to speak—neither too much competition nor too little competition would be in the public interest.

Accordingly, in passing the Bank Merger Act, the Congress did three things:

First, it required that the preservation of competition must be considered in judging bank mergers of every kind. I believe that virtually every banker in the United States honestly and sincerely believes that banking competition is essential to the welfare of this Nation and for that reason honestly and sincerely supports the principle of preservation of competition underlying the Bank Merger Act.

Second, the Congress prescribed that preservation of competition was not to be considered alone in judging the merits of a given bank merger, but was to be considered together with the financial condition and history of the banks involved, the adequacy of their capital structure, their earnings prospects, their management, and the convenience and needs of the community to be served.

In this respect the Bank Merger Act differs significantly from the Sherman and Clayton Acts, for the courts have consistently construed these laws—especially the Clayton Act—to mean that, except for a few special situations like the case of a failing company, other factors, such as public convenience and necessity, have no bearing in determining whether a particular merger is competitively proper or improper.

I think the Congress was correct in prescribing for the banking industry the rule in the Bank Merger Act that the preservation of competition must be weighed along with other policy factors.

Third, the Congress decided in the Bank Merger Act that bank mergers should be judged by those in Government best fitted to do so on account of their special knowledge and skill—the three Federal supervisory agencies. Even here, the Congress wanted to be sure that each bank supervisory agency had the advantage of the Attorney General's expertise in preserving competition as well as the views of the other two agencies and, accordingly, the Congress specifically provided that, in judging each merger application, an advisory opinion on the competitive factor must be requested from the Attorney General and the other two agencies.

Again, I strongly believe that the Congress made the correct decision in placing the ultimate responsibility for judging bank mergers in the hands of the supervisory agencies.

However, the effect of the Supreme Court's decisions in the *Philadelphia* and *Lexington* cases has been to frustrate what we in the banking industry thought was the intent of Congress, for these cases as a practical matter have changed the role of the Attorney General from that of an adviser to that of a regulator with a veto power, who is not bound to evaluate the other policy considerations stated in the Bank Merger Act. The result has been to create misunderstanding, confusion, and controversy in the banking field to the detriment of the public. We agree fully with the statement of Attorney General Katzenbach that:

> It just isn't right to have one arm of the Government say a merger is great and then have the Justice Department take the whole thing into court. (Forbes, Mar. 15, 1965, p. 14.)

We submit that it is not good Government policy to have one Government agency forcefully and publicly overruling the decisions of another agency. This is particularly true when the agency being overruled has been vested with the primary responsibility to supervise a regulated industry, such as banking.

PRACTICAL PROBLEMS

Aside from the public policy considerations, what is the practical effect of this situation on the banker contemplating a merger? It might be helpful to bring this matter into perspective by briefly describing some of the steps in a bank merger. First an acceptable offer must be formulated and submitted to the directors of both banks for approval. If the directors approve, then the shareholders of both banks must agree to the plan. At this stage a bank merger application is prepared to be submitted to the State bank authority, if a State bank is involved, and to the appropriate Federal bank supervisory agency.

In my own State of New York, the State banking board must act within 120 days after the time the application is filed. If approval is received after this 4-month wait, then the application is considered by the appropriate Federal bank supervisory agency. The Federal agencies have no statutory deadline on applications, but the elapsed time for a decision is usually 2 to 6 months. If the applicants are lucky, they will not have to incur the time and expense of a public hearing. In due time, a decision is rendered.

If the decision is favorable, the bankers cannot relax and proceed with the merger, but must wait to see if the Justice Department will overrule the banking agency decision. If the Justice Department does file an antitrust suit, the bankers are faced with a dilemma. They have invested perhaps a year's time and many thousands of dollars to obtain the necessary approval from State and Federal bank supervisory authorities. They must weigh this investment plus the expected benefits of the merger against the tremendous expense involved in defending an antitrust suit; the knowledge that the banks will be required to maintain the status quo during the 2 or 3 years the case may be pending; and the possibility of substantial damage to their business arising from the uncertainties of the situation.

Small banks just cannot afford to fight an antitrust suit and would be forced to drop their merger plans, although larger banks are in a better position to defend themselves.

We believe it is unreasonable to subject any bank, large or small, to this ordeal after it has received prior approval from its supervisory authorities.

EFFECT OF ROBERTSON BILL

Senator Robertson's bill would solve the problem by making it clear that the decision of the Federal supervisory agency on a bank merger application is final. The bill would reinstate what we in the banking industry thought was the intent of Congress—that bank mergers are to be judged by the bank supervisory agencies, after considering the policy factors set out in the Bank Merger Act, including (though not limited to) the competitive factor, and after receiving

the advice, but not the veto, of the Attorney General on this particular factor.

We wholeheartedly approve this bill and urge its passage promptly.

ENFORCEMENT OF MERGER ACT

We believe that the Bank Merger Act cannot be taken lightly. It is effective and has protected the public interest. The three banking agencies have not hesitated to turn down mergers that failed to meet the act's tests. I am sure you can obtain firsthand testimony on this subject from bankers who have had merger applications rejected. The regulation of bank mergers on the part of the banking authorities has fully lived up to the expectations of this committee and the Congress.

There is every reason to believe that the enforcement of the Bank Merger Act will be equally effective, if not more so, in the future. Prior to 1960, there had been no statutory requirement that the banking agencies weigh the competitive factors in mergers. Thus the agencies and their staffs have had to learn by experience on a case-by-case basis. Today the agencies have over 5 years of experience and have developed an expertise in judging banking competition unequaled by anyone else.

EXPERIENCE OF BANKERS

We also feel that bankers have learned much in the past 5 years. There is an awareness of the importance of preserving competition in banking, and the competitive aspects of each merger have become of paramount significance. Bankers realize that even after the Robertson bill is enacted, competitive problems will still be present and continue to manifest themselves in the future. However, there is hope that the passage of the Robertson bill will enable the banking agencies to concentrate on developing uniform guidelines so that a banker can more clearly ascertain in advance whether a particular merger is prohibited. This has not been possible in the present atmosphere.

CONCLUSION

The Robertson bill does not directly affect registered bank holding companies, although it does, of course, apply to banks owned by bank holding companies.

However, bank holding companies have some appreciation of the problem of overlapping jurisdiction of Federal agencies. Under the Bank Holding Company Act of 1956, the Federal Reserve Board must give prior approval before a bank holding company can acquire a bank. The Board applies standards comparable to the Bank Merger Act including a competitive test. Nevertheless, it is always possible that the Justice Department may come into the picture and attempt to undo something that took place years ago. Although we may seek a congressional solution to this problem in the future, we are not asking for legislative action at this time.

Nevertheless, we do feel the principle involved in the Robertson bill is a fundamental one and provides a much needed demarcation of authority between the banking agencies and the Justice Department.

Our association is pleased to join the many distinguished groups supporting this legislation.

I shall be happy to answer any questions you may have.

(The list of officers of the association follows:)

ASSOCIATION OF REGISTERED BANK HOLDING COMPANIES

OFFICERS

President Baldwin Maull, Marine Midland Corp., Buffalo, N.Y.
Vice President Philip Eiseman, Baystate Corp., Boston, Mass.
Vice President Mills B. Lane, Jr., Citizens & Southern Holding Co., Savannah, Ga.
Treasurer George S. Eccles, First Security Corp., Salt Lake City, Utah
Donald L. Rogers, secretary and executive director, Washington, D.C.

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Philip Eiseman, Baystate Corp., Boston, Mass.
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George S. Eccles, First Security Corp., Salt Lake City, Utah
Edwin T. Holland, First Virginia Corp., Arlington, Va.
William G. Brumder, First Wisconsin Bankshares Corp., Milwaukee, Wis.
Jack G. Butler, General Bancshares Corp., St. Louis, Mo.
Baldwin Maull, Marine Midland Corp., Buffalo, N.Y.
Harold Nicolaus, Marine Corp., Milwaukee, Wis.
Goodrich Lowry, Northwest Bancorporation, Minneapolis, Minn.
W. W. Witherspoon, Old National Corp., Spokane, Wash.
Leslie J. Scott, Shawmut Association, Boston, Mass.
Mervin B. France, Society Corp., Cleveland, Ohio
J. Harvie Wilkinson, Jr., United Virginia Bankshares, Richmond, Va.
Herbert Moseley, Virginia Commonwealth Corp., Richmond, Va.
Frank L. King, Western Bancorporation, Los Angeles, Calif.

Mr. MAULL. I should be very happy to answer any questions.

The CHAIRMAN. You have given us a fine statement, and I appreciate it.

Are there any questions?

Senator PROXMIRE. I would just say I am happy to have Mr. Maull here. His board of directors includes two very distinguished citizens of Wisconsin, who are prominent leading bankers, Mr. Brumder and Mr. Nicholas.

I would like to ask a brief question, Mr. Chairman. I am still not clear what interests the bank holding companies as such have in this particular legislation. You say you are not asking to amend the legislation to apply exemption to antitrust laws to bank holding companies, and yet you do have a particular interest that has persuaded your organization to authorize you to come before us.

Mr. MAULL. The banks owned by the bank holding companies are themselves subject to the Bank Merger Act. When they have a merger, either within or without their organization, they are subject to this conflict between the bank supervisory authorities and the Attorney General.

Senator PROXMIRE. Let me ask one other thing that is not directly related to the bill, but I would like information on. What can a

bank holding company provide as such? If you form a corporation and buy two banks, what aspects or advantages of a merger can you provide with your holding company that you would miss if you simply have two separate banks? Is this a halfway house? Is this a compromise?

Mr. MAULL. Sir, I just made a 15-minute speech on that subject in New Jersey yesterday and a half hour speech on it a few days before.

Senator PROXMIRE. How about a 2-minute speech this morning.

Mr. MAULL. The holding company is a different form of operation from a branch system. It represents, at least in our case, a group of 11 banks with separate boards of directors and separate officers.

The bank holding company exerts some influence to see that the boards and officers are kept at a high level, although the boards choose their own successors.

It also supplies capital and can raise capital far more advantageously than the individual bank could do.

Third, it supplies services in those cases where by pooling the expense the banks can get a higher quality of service than any individual bank could afford. Those services are on an advisory basis.

It also brings the banks together by a committee system, so banks may work out steady improvements in their services in practically every field.

Senator PROXMIRE. That sounds very advantageous. It doesn't satisfy you, however. You would like to go a little further, with some of the banks you own, in the way of mergers.

Mr. MAULL. I didn't understand the question.

Senator PROXMIRE. I say you would like to go further than this. This is not sufficient, as far as you are concerned, in your corporation. You would like to be able to merge at least two of the banks.

Mr. MAULL. Well, we are able to merge and we do have mergers.

Senator PROXMIRE. You are able to merge, but you have to go to the Attorney General now and you feel you should not have to do so.

Mr. MAULL. That is right. We feel when the supervisory agencies approve it, that should be sufficient.

Senator PROXMIRE. Thank you.

The CHAIRMAN. Before the witness leaves, I want to remind the members of this committee of something which I am sure they already know. The witness is accompanied by the chief counsel and Washington representative of this national association, Don Rogers. The witness was brought to Washington by our former colleague from Ohio, Mr. Bricker.

I found that he was so good, that when I became chairman of the Subcommittee on Financial Matters, I asked him to be my chief clerk and he helped me to write the Bank Holding Company Act of 1956 and the Financial Institutions Act of 1957, and the bankers figured he was so good, I lost him.

Thank you, gentlemen.

The CHAIRMAN. Our next witness is a good friend from Pennsylvania. He has to catch a plane, I understand, and we are pleased to recognize him at this time, the chairman of the Legislative Committee, Independent Bankers Association, and president, Central Pennsylvania National Bank, the Honorable D. Emmert Brumbaugh, and we will also hear Mr. Ralph L. Zaun, president of the Independent Bankers Association, Grafton, Wis.

Senator PROXMIRE. I have known Mr. Zaun for many years. He and I served in the Wisconsin State Assembly together. He is a man of great integrity and ability, and also a successful banker. I am mighty proud he has distinguished himself by being elected president of this association. He has a fine record in Wisconsin.

The CHAIRMAN. I have had some correspondence with him, and when my father came out of college, his first job was in a town called Grafton.

We also have Mr. Kirkpatrick, special counsel, independent Bankers Association.

STATEMENT OF D. EMMERT BRUMBAUGH, CHAIRMAN, FEDERAL LEGISLATIVE COMMITTEE, INDEPENDENT BANKERS ASSOCIATION OF AMERICA

Senator DOUGLAS. Mr. Chairman, I would like to point out that these gentlemen are taking the stand at 11:27 on the third day. The proponents of the bill had two full sessions, and what would normally be three-quarters of the third session. Now, I hope very much these gentlemen can appear this afternoon.

The CHAIRMAN. The remarks of the distinguished Senator are somewhat unjustified. I have already announced we would have an afternoon session today. And I said if these witnesses could not finish today, we would hear them next week, if necessary, or the week following. We are not going to shut off anybody that wants to appear.

Mr. ZAUN. Mr. Chairman, we have indicated to Mr. Hale that we are willing to come back this afternoon, or next week. We only ask that Mr. Brumbaugh be heard this morning.

Mr. BRUMBAUGH. Mr. Chairman, the reason they are letting me on here first, I have to be at a dinner for our honorable Governor on next Wednesday evening. The Jewish people are honoring him by placing a shrine in Israel in his honor, so I can't come back next week. So, I will give my testimony today.

I am president of the Central Pennsylvania National Bank of Claysburg, Pa., and appear here as chairman of the Federal Legislative Committee of the Independent Bankers Association of America. As you know, I am a former Member of the House of Representatives, where I served on the Banking and Currency Committee; former superintendent of banking in Pennsylvania, former president of the National Association of Supervisors of State Banks and a past president of the Independent Bankers Association. Presently, I am a Pennsylvania State senator. I am vice chairman of the Banking Committee in the Pennsylvania Senate, and chairman of the corporation committee.

I appear here in opposition to the proposal to eliminate the Department of Justice from the bank merger scene. Retention of Justice as the ultimate restraint on merging will help us maintain a competitive banking system. We should try to insure, by every means possible, that this Nation does not move toward a banking system of the type existing in England, France, and Canada, where a handful of banks control money and credit.

A major reason for enacting laws is to protect the weak against the strong. Without restrictive legislation, we would have a system of banking that would cover the Nation. It would be operated by a few

giant-size banks. Restraints, such as the Clayton and Sherman antitrust laws, are the most effective weapons available to protect us from this type of banking.

The bank antitrust case with which I am most familiar involved two fine banks in Philadelphia, Girard Trust and Philadelphia National. After a merger of the two institutions had been approved by the supervisory authorities, Justice moved to block it. In recognition of this fact, management of the banks delayed consummation of the merger until the litigation was settled.

As we all know, the U.S. Supreme Court said the merger was in violation of antitrust laws. I am thoroughly convinced that keeping these banks separate was in the best interest of Philadelphia. These two banks continue to grow and prosper as separate institutions.

Had the merger been permitted, it would have created the city's largest bank and concentrated in the merged institution 36 percent of the commercial bank deposits in the four-county Philadelphia trade area.

I commend the Philadelphia banks for conducting themselves as they did. By contrast, some other banks activated their mergers even though they were on notice from Justice that this would trigger an antitrust court action. Had they not decided to flout this basic law, I doubt that we would be here today.

S. 1698 cannot be justified on the ground that banking is regulated and therefore should be exempt from antitrust laws.

As a former State banking supervisor, I can tell this committee that banks are not regulated in the areas of direct contact with the public. The availability of loans and the rates charged on loans, and likewise the rates paid on savings, are governed by competition.

There are ceilings on these rates, but competition has always kept these rates well under the ceilings.

This is in sharp contrast with shielded industries like railroads and utilities, whose rates are fixed by Government decree. There is good reason for fixing rates in such cases because competition is nonexistent or ineffective to do the job. The opposite is true in banking, where competition is an effective regulator of rates.

Preserving competition in banking has always been and still is our deliberate national policy. If a bill like S. 1698 were passed, I suggest to you that you would start a reversal of our longstanding policy. Such an action would indicate that we have abandoned our faith in competition as the regulator in the public interest. It would indicate a softness toward mergers.

Later, holding companies and branching systems would demand exemption and this would be difficult to deny.

Looking far ahead down the road, I can see where such actions would lead to more concentration and less competition, until we get to the point where it may become necessary in the public interest to fix bank rates.

If and when that happens, bank earnings, like those in utility companies, will be limited to a fair return on invested capital. I would suggest that bankers ponder this prospect before supporting a measure which would take banking out of the competitive arena and ultimately put it in the rate-fixing arena.

To those who feel it is safe to leave the problem of mergers and concentration to the regulatory agencies, I say the record speaks for

itself. Almost all applications for mergers, holding company acquisitions and branches have been approved by the agencies in recent years.

Bank mergers are one of the ways in which competition is reduced and concentration increased. The other two are bank holding companies and branching systems.

In order to properly evaluate the effect of bank mergers in recent years on the total problem of banking concentration in this country, it is necessary to view the trends in all three areas and our historic policies concerning them.

The problem of bank mergers should not be isolated from the total problem, and such an important step as contemplated in S. 1698 should not be considered without calculating the effect upon the total problem.

Exemption of bank mergers from the antitrust laws will most certainly lead to demand for similar exemption in the other two areas, ultimately taking banking out of the antitrust laws altogether. Thus, we should view the entire field of banking and the ultimate effect of such complete exemption on the trend to concentration before considering taking the drastic first step proposed in this bill.

Viewing the last 10 years alone, we have seen an enormous amount of concentration of banking resources in spite of two efforts by Congress in that period to stem the tide. The Bank Holding Company Act of 1956 and the Bank Merger Act of 1960, which at the time of their enactment seemed drastic, and in fact were the strongest medicine ever prescribed in our history, have largely proved ineffectual.

Seventy-eight percent of the applications for acquisitions of banks under the Bank Holding Company Act have been approved by the Federal Reserve Board, according to latest published figures available to us. Six hundred and forty–four applications for bank mergers have been approved and only 31 disapproved under the Merger Act.

We started out 10 years ago viewing the rapid trend to concentration with great alarm. Now we can only view the scene with greater alarm because the trend has not only continued but has increased in intensity. All this has occurred in spite of the two greatest efforts in history to assert controls, and in spite of our antitrust laws.

The total of all of our weapons has not been enough, but now it is proposed to do away with a basic and important safeguard.

Let us look at the record.

In 1959, your committee in its report after hearings on the bank merger bill stated in effect that the antitrust laws had rarely been used and that more controls over bank mergers were needed. Your report summarized a great deal of economic data going back to the great depression of the 1930's with these few words:

> The large numbers of mergers in recent years, the vast resources involved in these mergers, and the increases in the size of the largest banks, particularly those which have grown through mergers, all give rise to concern for the maintenance of vigorous competition in the banking system and in the industry and commerce served by the banking system. The reduction in the number of banks and the loss of competition between merged banks also give rise to concern.

Other committees of Congress have scrutinized the economic health of the banking system with a view to measuring its effect upon the national economy. For example, the House Small Business Committee published a 97-page report on December 23, 1960, entitled "Banking Concentration and Small Business."

This report found that at the end of 1959 the multiunit bank systems, that is, holding companies and branch systems, controlled 66 percent of total banking assets in the country. We note in passing that in many cases branches are established by the merger route.

The committee concluded its report by observing that the Federal Reserve Board, which had been charged by law with enforcement of the antitrust laws in banking, "has not seen fit to devote substantial numbers of persons or dollars to realistic antitrust enforcement * * *." (Report of Select Committee on Small Business, Dec. 23, 1960, pps. 8, 50.)

This study by the House committee was updated by the Senate Small Business Committee, based upon the findings of the Federal Reserve Board on January 5, 1962. Chairman Sparkman, for the committee, in a press release dated February 12, 1962, summarized the findings of the 10-year study as follows:

> Through mergers or absorptions, 1,311 independent banks were converted into branches and 4,824 new branch outlets were established.
>
> Of all the mergers and consolidations, nearly half were acquired by banks with assets of more than $100 million. Putting it another way, 2.2 percent of all insured banks absorbed about half the banks that went out of business.
>
> Branch banks, the study said, grew from 5 percent of all banking offices in 1921 to 44 percent in mid-1961.

The report, itself, contains this statement:

> Mergers and consolidations are relatively easy and inexpensive means of acquiring branch offices. About 85 percent of the banks taken over by other banks between January 1952 and June 1961, were converted into branches of the surviving bank. ("Recent Developments in the Structure of Banking," Senate Small Business Committee report, 87th Cong., 2d sess., Jan. 5, 1962, p. 8.)

I also would like to refer to one sentence in the House Banking Committee report, urging adoption of the 1960 Merger Act. It said:

> Sad experiences in our history have demonstrated that to maintain a sound banking system in this country banks must be regulated much more strictly than ordinary business.

Now, what precisely has occurred since adoption of the 1960 act? To determine this, we requested statistical data from Justice and received this summary covering the period from May 13, 1960, the date of the Bank Merger Act's enactment, to December 31, 1964:

> Seven hundred and fifteen banks with resources of $15.7 billion absorbed by mergers.
>
> In the period, Justice reported adverse competitive effects on 470 of 782 merger applications. No adverse competitive effects were reported on 300 applications. Of 675 applications passed on by the banking agencies, 644 were approved and 31 disapproved.

Now, here's a comparison of merger activity in the 3 years before the Merger Act and the 3 years following.

> In 1957–59, 472 banks with assets of $7.8 billion were absorbed in mergers. In 1961–63, 477 banks with $11.7 billion in assets were absorbed in mergers.

Instead of making mergers more difficult, which was the intent Congress had, the act seems even to have had the opposite effect.

The record makes prophetic the following statement by four members of the Senate Banking and Currency Committee, included in a

supplementary report to the committee report on the Bank Merger Act, and I quote:

There is a pronounced tendency in American life for the regulatory bodies which are set up to protect the public to become influenced and largely controlled by the very groups which they were created to regulate. In this respect, there is nothing sacrosanct about the bank regulatory agencies. We are not certain how much attention they will pay to the opinions of the Department of Justice or how vigorously the Department itself will act. But there will be at least a greater chance that the need for competition will be stressed than was provided in the bill originally sponsored by the examining agencies.

The Merger Act has failed in its objective; it not only has failed to achieve the high hopes held for it by the authors and the Senate and House Banking Committees, but it has speeded the rate of bank mergers. It also has increased by several billion dollars the amount of bank assets disappearing in mergers. No wonder, when the approval rate of merger applications by bank supervisory agencies has been over 20 to 1.

This extraordinary approval rate by the three Federal agencies has encouraged applications for mergers. This high rate cannot possibly be a proper response to the avowed intent of Congress in adopting the act, and to the very language of the act itself.

How can any confidence be reposed in an act which produces such results? How can we possibly conclude that this bill should be adopted, leaving us only with an ineffectual act which produces results directly opposite to that intended by Congress?

By way of underscoring the failure of the Bank Merger Act of 1960 to do the job intended, both the *Philadelphia* and *Lexington* bank cases report the fact that in each instance both of the other regulatory agencies and the Attorney General recommended that the merger applications under the act be denied.

We think that Justice Department has acted with remarkable restraint in the bank merger field. In the data referred to above it will be noted that on 470 applications the Department of Justice reported adverse competitive effects, yet it instituted only seven actions under the antitrust laws seeking to set aside those mergers on the ground they violated the antitrust laws.

In each of the seven instances, one or both of the other agencies disapproved of the merger. In each instance, the banks involved were strong banks, competing with each other in the same area. All of them presented aggravated situations. In these seven cases, there have been final decisions in two—a lower court has found violations in one case,and in another case the banks involved withdrew their merger application, and in the remaining three, trials are pending.

Of necessity, the Justice Department must be selective and can handle no more than a few of the most flagrant cases due to its limited staff and resources. Yet, it is quite obvious these few lawsuits have been extremely effective.

The effects of the *Philadelphia* and *Lexington* decisions by the U.S. Supreme Court have had a profound impact upon the banking community, far more so than the 1 in 20 possibility of a denial under the Bank Merger Act. Why should we give up such a good deterrent, to let stand in its place as the sole deterrent an act which has proved to be a toothless tiger?

48-140—65——11

We feel that this committee should carefully consider the concluding paragraph of the *Philadelphia* decision which is so highly pertinent. The Court stated:

> At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fullfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy * * * . There is no warrant for declining to enforce it in the instant case (83 Sup. Ct. 1746).

We would like to paraphrase the last sentence of the opinion by saying there is no warrant for discarding the antitrust laws, which are proving so effective in the bank merger field, when we need all the weapons available in the battle to preserve competition in banking and to avoid monopoly.

The CHAIRMAN. Thank you, sir. You have presented a well-prepared and interesting statement.

While I don't agree with your conclusions, I concede you have presented persuasive arguments, and especially your reference to a most unusual merger case.

Were you bank commissioner back there when Girard and Philadelphia National asked to merge?

Mr. BRUMBAUGH. No; but the Justice Department subpenaed me as a witness to oppose it. I appeared there opposing the merger.

The CHAIRMAN. You opposed the merger, but you were not commissioner?

Mr. BRUMBAUGH. No, sir.

The CHAIRMAN. Now, since one was a National bank and one was a State bank—Girard was State; wasn't it?

Mr. BRUMBAUGH. Yes.

The CHAIRMAN. The Comptroller had the final decision because the new bank was to be a national bank; is that right?

Mr. BRUMBAUGH. That is right; yes. Philadelphia National was the larger of the two.

The CHAIRMAN. And you say if they had merged, they would have had 36 percent of the banking resources of the Philadelphia area?

Mr. BRUMBAUGH. Correct.

The CHAIRMAN. I believe the Philadelphia was about a billion-dollar bank, and Girard was $685 million.

Do you know of any merger where they had 36 percent of the local banking resources?

Mr. BRUMBAUGH. I think Lexington had a lot more than that.

The CHAIRMAN. Lexington had a lot more than that?

Mr. BRUMBAUGH. Yes.

The CHAIRMAN. I am not too familiar with the details of Lexington. What kind of banks were involved there?

Mr. BRUMBAUGH. I don't know whether they were State or National.

The CHAIRMAN. Were they both State, both National, or were they mixed?

Mr. BRUMBAUGH. I just can't tell you that.

The CHAIRMAN. I can't recall any merger, except this one, in which two of the three regulatory agencies expressed disapproval of

the merger, and the Department of Justice, before it started, expressed disapproval.

Do you know of any other such case?

Mr. BRUMBAUGH. I think one of the other agencies was opposed to it. But these particular cases, I think they opposed it on the basis of the amount of concentration it would bring into the one bank in that particular center. It would possibly not have been monopolistic but, nevertheless, it is a trend in that direction.

I think what we are trying to avoid is getting too much concentration in the hands of a few. I think it is in the best interests of the country.

The CHAIRMAN. I just felt—I may be wrong, but I thought this was a little unusual case, and it was not typical of what has happened. When mergers occurred, they might or might not unduly affect competition. But I don't remember any other case in a big community where it would mean control of 36 percent, and where two or three of the Federal agencies were opposed.

Mr. BRUMBAUGH. I think you will find a merger in Missouri that would control 48 percent in that district.

The CHAIRMAN. What case is that?

Mr. ZAUN. There were nine banks in this community and the first largest and the third largest banks merged, and the merged bank then controlled 48 percent of the assets of this particular community, sir.

The CHAIRMAN. This report by my colleagues says:

> There is a pronounced tendency in American life for the regulatory bodies which are set up to protect the public to become influenced and largely controlled by the very groups which they were created to regulate. In this respect there is nothing sacrosanct about the bank regulatory agencies. We are not certain how much attention they will pay to the opinions of the Department of Justice or how vigorously the Department itself will act. But there will be at least a greater chance that the need for competition will be stressed than was provided in the bill originally sponsored by the examining agencies.

Well, I was a patron of the bill, and I didn't object to proper amendments that would make it clear that I was just as much opposed to monopoly as anybody. And that is what we sought to do.

But I didn't think it ought to be handled by the Department of Justice. Now, did you suffer from any of these regulatory agencies that run roughshod over you when you were banking commissioner and, if so, which?

Mr. BRUMBAUGH. I was banking commissioner in 1947–51, and there were very few mergers in that time. These mergers just started to spring up in the last 10 to 15 years, to any great extent. Prior to that time there were restrictions even in the States as to how much a bank can move. There still are in our State.

The CHAIRMAN. How many banks do you have in Pennsylvania?

Mr. BRUMBAUGH. Approximately 900.

The CHAIRMAN. How many are National and how many are State?

Mr. BRUMBAUGH. More National than State. I think it runs about 5 to 4, or a little better than that, National. We have more National than State.

The CHAIRMAN. You had the first national bank in the United States in Pennsylvania, didn't you?

Mr. BRUMBAUGH. The First National of Philadelphia was the first. You know, Senator Clark's father was a director in that bank, and he

was 91 years of age, and they wheeled him to the directors' meeting in a wheelchair.

The CHAIRMAN. And that is the First Pennsylvania now, isn't it?

Mr. BRUMBAUGH. The First Pennsylvania Co. took it over.

The CHAIRMAN. That is your biggest bank still, isn't it?

Mr. BRUMBAUGH. That is the largest bank in Philadelphia.

The CHAIRMAN. Over a billion dollars, isn't it?

Mr. BRUMBAUGH. About $1,400 million. But the other two banks that were going to merge, one over $1,100 million, and the other over $900 million, so it would have been a $3 billion bank.

The CHAIRMAN. Girard was $685 million at that time?

Mr. BRUMBAUGH. That is right. They are $980 million now.

The CHAIRMAN. Well, there is nothing in this bill that merges them.

Mr. BRUMBAUGH. No, no.

The CHAIRMAN. This bill doesn't affect them in one way or another.

Mr. BRUMBAUGH. No; the only banks it does affect I think are those cited by the Justice Department.

The CHAIRMAN. That is right—the Philadelphia banks were never merged so this bill doesn't unmerge them or force them to merge now.

Mr. BRUMBAUGH. No; that is not a problem. I realize you have a problem with the others.

The CHAIRMAN. According to your statement, they have done so well operating alone, they wouldn't want to merge even if they could get approval now.

Mr. BRUMBAUGH. I think it is to their advantage not to merge, because they have a competitive system and there are certainly more opportunities for their employees to become president of two banks rather than to become president of one.

I am sure they like that because, every time you merge, you throw one president out. You only have one. It travels that way all over the country.

The CHAIRMAN. Well, there may be something in having more employees if you don't merge. But sometimes, if you have to put the wages up, $1.50 minimum, and overtime, sometimes you have to merge, because you can't keep paying those wages. That is just one factor in staying in business.

The Senator from Illinois.

Senator DOUGLAS. First let me thank the witness for mentioning the supplemental report which four members of this committee prepared, and, for the sake of the record, I will identify them as the Senator from Wisconsin, Mr. Proxmire; the Senator from Pennsylvania, Mr. Clark; the Senator from Maine, Mr. Muskie; and myself.

I appreciate the fact that you have called attention to our report about this matter. We wanted to give more powers to the Department of Justice, because we were very dubious as to the degree to which the regulatory agencies would pay attention to the principle of competition.

We based that upon the record of the agencies in years prior to the passage of the act. We found that in the 9 years, from 1950 to 1958, inclusive, the Comptroller of the Currency approved 731 mergers and disapproved of only 22, or approved 97 percent of the mergers. And the amendment which the four of us proposed, and which met with a great deal of opposition from the regulatory agencies,

was to at least let the Department of Justice have the opportunity to give its advice to the regulatory agencies.

Now, you have supplied on page 9 some very interesting material that I wanted and have not previously been able to obtain. You state that of 675 applications for mergers received by the banking agencies, 644 were approved and 31 disapproved; or, in other words, 95 percent of the applications for mergers were approved by the agency in charge of such matters. But the Justice Department reported adverse competitive effects on 470 of the 782 merger applications.

There is some lack of agreement between the 675 applications received and the 782, but I will pass over that.

In any event, of the 470 adverse reports by Justice, apparently in only 31 cases were the opinions of the Justice Department considered adequate by the regulatory agency, or they turned Justice down in over 90 percent, well over 90 percent, of the cases. So our forebodings, I submit, have been borne out.

We said we were not certain how much attention they would pay to the opinion of the Department of Justice. That is a very delicate phrase that we used. I think we can be certain now; namely, that they pay very little attention to the opinions of the Department of Justice.

Mr. BRUMBAUGH. I think, in the Department of Justice, there would be some time limit set when they enter into a protest as to the merger, so the bank can know, say, within 60 days, what is going to happen. I think that is very important.

Senator DOUGLAS. You have made a very significant statement, but the acoustics are bad.

Mr. BRUMBAUGH. I said we are of the opinion that the Justice Department should give their decision as to whether they are going to object to a merger or any action against a banking institution within, say, 60 days after the merger has been approved by the agency that had the prior approval.

A lot of the banks today that have merged are of the opinion that the Justice Department might come back and enter into their merger, because there doesn't seem to be anything in the act to prevent them from doing this.

Senator DOUGLAS. Does this represent the attitude of the Independent Bankers Association?

Mr. BRUMBAUGH. Yes, it does.

Senator DOUGLAS. In other words, that action by the Justice Department under the Antitrust Act, should be initiated within 60 days?

Mr. BRUMBAUGH. Within any limited length of time. The length of time makes no difference, just so it is limited.

Senator DOUGLAS. I think that is a significant suggestion, because it protects the bank from the danger that after they merge, a long time after the "wedding" has been completed, the Justice Department comes in.

Mr. BRUMBAUGH. I think, too, if you are going to amend this act, you should provide that these banks that have not received a protest from the Justice Department, would not, unless they asked for further mergers.

Senator DOUGLAS. Mergers should not be conducted during that 60-day waiting period?

Mr. BRUMBAUGH. That is right.

Senator DOUGLAS. In other words, there should be a stay in proceedings for 60 days, and during that time Justice should make up its mind whether or not it will oppose the case in courts?

Mr. BRUMBAUGH. That is right.

Senator DOUGLAS. I think that is a very significant proposal which would meet at least many of the objections which have been offered to the present situation.

Mr. BRUMBAUGH. I think Mr. Zaun will go into this further with you, when he testifies.

The CHAIRMAN. The Chair would point out that while the Chairman of the Federal Reserve Board supports the pending bill, he did say as an alternate proposal he would support what this distinguished witness said should be the legislation. I don't question the foresight of the four Senators who did suggest we were not having proper safeguards in the 1960 act. But when you mention "objections" by the Justice Department, I call attention to the fact that what the Justice Department actually does is to put the cases into categories according to Justice's ideas as to the effect on competition"—favorable," "no adverse effect," "slightly adverse," "not substantially adverse," "adverse," "significantly adverse," "substantially adverse," "substantially adverse and serious anticompetitive effect," and "threat of litigation."

I take it, when I read these hundreds of pages of the distinguished judge who passed on Hanover Trust, it boils down to this: There were two banks; now we have only one. You have eliminated competition when you had two banks and you now have one; ergo, you are illegal. So it is surprising to me, with all of these differentiations, I just don't know how they get all of these shaded things. But I am telling you that is the way they say it—"slightly," "not substantial," "adverse," "substantially adverse," "substantially serious." They might as well say "Well, if you had two banks, and haven't got but one, we are 'agin' you." That is what we are really up against in the future, and that is the reason I imagine that you say this, because you can imagine there may be a few banks in your State—you have to compete with New York, don't you?

Mr. BRUMBAUGH. Yes.

The CHAIRMAN. You have to compete with San Francisco, even, don't you?

Mr. BRUMBAUGH. Well, very little, in the small institutions.

The CHAIRMAN. It is potential, though?

Mr. BRUMBAUGH. Oh, yes.

The CHAIRMAN. And you have seen a great deal of increase in credit, bank credit, private credit, every kind of credit, hundreds of percent increase in recent years. So the banks have to be prepared to lend more money than ever before, don't they?

Mr. BRUMBAUGH. I heard a witness state yesterday they had a capacity of $2,000,300, but never make a loan over a million dollars.

The CHAIRMAN. The point is, if you have a $50,000 capital bank, it can make a loan up to so much, and if it has a million dollar capital, it can take care of a great deal more customers.

Mr. BRUMBAUGH. I presume it would be, and we must have large banks. We are not denying that issue at all. But what we are trying to do is to prevent monopoly in banking, so we don't break down the barriers.

The CHAIRMAN. I just want to call attention to the fact that, at this time, we have had a very able and active Comptroller. The State banks outnumbered the national banks 2 to 1. They were dominating the field. And apparently, he wanted to strengthen the national banks, so he has been creating a lot of new ones, and these mergers have been approved by him, because he thinks that is the proper way to promote the national banking system and better preserve the balance between a dual system.

The Senator from Wisconsin.

Senator PROXMIRE. Mr. Brumbaugh, you indicated there are three elements that are promoting concentration in banking; one, bank mergers; two, holding companies; and three, branch banking.

Mr. BRUMBAUGH. That is correct.

Senator PROXMIRE. You pointed out there has been an increase since 1921 of from 5 percent of the banking done by banks with branches, to 44 percent.

There has also been some increased activity at least in recent years in holding companies–

Mr. BRUMBAUGH. Yes.

Senator PROXMIRE. All you are asking is that the bank mergers be scrutinized by the Department of Justice and that Justice be in a position to sue in the unusual case in which they feel that they must, on the basis of their record?

Is that correct?

Mr. BRUMBAUGH. I think there should be some restraint over a bank commissioner, or Comptroller of the Currency, or anyone who has authority to grant mergers.

Senator PROXMIRE. What is your answer to testimony we have had this morning and right along, that you have to have a growth in big banks, you have to have mergers, you have to have statewide banking systems and so forth, to keep pace with the increased concentration and growth of industry?

Mr. BRUMBAUGH. I think the correspondent banks take pretty good care of that.

Senator PROXMIRE. Correspondent banking system?

Mr. BRUMBAUGH. Yes, and if we can't make a loan, if the loan is too large for us, we have no problem in getting participations from our correspondent banks. They never turn us down.

Senator PROXMIRE. I am not thinking of the problem of the bank so much; I am thinking of the problems of the customer. Say you have a customer who has a statewide organization. He has clients in several cities. He has stores in several cities. Isn't it important to him to be able to deal with one bank to take care of that situation?

Mr. BRUMBAUGH. Not necessarily, no.

Senator PROXMIRE. You mean correspondent banking would handle the situation?

Mr. BRUMBAUGH. That is right.

Senator PROXMIRE. Can you give us any up-to-date estimate or at least judgment on the adequacy of personnel assigned by the regulatory agencies to investigate and analyze the competitive situations in these proposed mergers?

You allege that back in 1959, before this bill was passed, before the 1960 bill was passed—you don't allege it, you quote the Small Business Committee which charged that personnel was inadequate.

I am wondering if there is any indication now that they don't have adequate personnel to do this job? The Federal Reserve Board, Comptroller of the Currency, and FDIC.

Mr. BRUMBAUGH. I don't believe that they lack personnel at the present time.

Senator PROXMIRE. You think they have adequate personnel to do the job now?

Mr. BRUMBAUGH. I would think so. They give good service. I see no reason why they couldn't get sufficient help to help them out in their examinations. Of course, the Department of Justice has sufficient help, too.

Senator PROXMIRE. You, as a banker, and a man with great experience in this field, you don't see any justification in the position taken by the Governor, the Chairman of the Board of Federal Reserve, and every other witness that supports this bill, that even if the Department of Justice finds the strongest evidence of adverse effects on competition, even if the regulatory agency agrees that it is going to have this strong effect, that even still they would approve the merger if the other factors counterbalanced that finding?

Do you think this would be justified as a principle?

Mr. BRUMBAUGH. You mean this bill be justified?

Senator PROXMIRE. No; what I am talking about is this: Mr. Martin told us yesterday that even where the Department of Justice finds that the effect on competition of a merger can have the strongest adverse effect on competition, and even where he would concur it would have the strongest adverse effect on competition, he would still feel free to recommend the merger if the other six categories in his judgment, counterbalanced this adverse competitive effect.

It seemed to me, I was quite shocked by this—perhaps I am wrong—but it seemed to me as someone who is not a banker that this was a judgment that was a bad one, and it seems to me this is the crucial issue here. Because what Mr. Martin is telling us is that you have to have people deciding whether or not banks can merge who will give weight not just to the antitrust aspect, not just to the competitive aspect, but will give weight to other banking aspects which the Department of Justice is not competent to consider.

This is really the crux of this bill, in my judgment.

Mr. BRUMBAUGH. I just can't agree with him. You must take into consideration these Government agencies are naturally expecting power for themselves, too, and naturally they would testify in favor of this bill, all of them, including the National Association of State Supervisors of Banks, because they are after sufficient power to be granted to them with no restraint whatever from anyone else.

Senator PROXMIRE. That is all, Mr. Chairman.

Mr. BRUMBAUGH. Thank you very much, Mr. Chairman, for giving me an opportunity to appear before this committee.

The CHAIRMAN. Thank you.

All right, Mr. Kirkpatrick.

STATEMENT OF WALLACE KIRKPATRICK, SPECIAL COUNSEL, INDEPENDENT BANKERS ASSOCIATION OF AMERICA

Mr. KIRKPATRICK. Mr. Chairman and gentlemen, my name is W. Wallace Kirkpatrick. I am appearing before your committee today as a consultant for, and am testifying on behalf of the Independent Bankers Association of America. I am now assistant dean of the Law School of the George Washington University. For many years I was with the Antitrust Division of the U.S. Department of Justice and for a time, I was the Acting Assistant Attorney General in charge of that Division. During the period when I was the acting head of the Division, the antitrust cases against the Lexington and the Philadelphia Banks were filed.

I would like to discuss the application of the antitrust laws to banking and particularly to bank mergers, and then to point out why we believe inadequate the reasons advanced to support the proposed exemption of bank mergers from the antitrust laws.

The chairman and other members of this committee have repeatedly made plain their strong support for competition in banking, under the dual banking system. I should like to talk about this competition and our strong support for it, too. For we think that competition in banking is essential for our free economy.

The basic antitrust law, the Sherman Act, has been called a charter of freedom by Chief Justice Hughes, who pointed out that the purpose of the act was—

> * * * to prevent undue restraint of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influence of monopolistic endeavor. (*Appalachian Coals Inc.* v. *U.S.*, 288 U.S. 344.)

In 1953, the Attorney General named a distinguished committee to produce a "thoughful and comprehensive study" of our antitrust laws. This committee stated:

> The general objective of the antitrust laws is promotion of competition in open markets. This policy is a primary feature of private enterprise. Most Americans have long recognized that opportunity for market access and fostering of market rivalry are basic tenets of our faith in competition as a form of economic organization.
>
> * * * Congress has specified a policy favoring competition as an essential ingredient in a wide variety of regulatory statutes dealing, for example, with banking, transportation, communications, and the disposal of Government surplus property.
>
> Antitrust is a distinctive American means for assuring the competitive economy on which our political and social freedom under representative government in part depend. These laws have helped release energies essential to our development. They reinforce our ideal of careers open to superior skills and talent, a crucial index of a free society. As a result, the essentials of antitrust are today proclaimed by both political parties as necessary to assure economic opportunity and some limitation on economic power incompatible with the maintenance of competitive conditions. (Report, Attorney General's Committee, pp. 1–2.)

Our antitrust laws have their roots in ancient concepts of the common law. These concepts have served us well in all segments of our economy because we have chosen to adhere to them to the maximum extent possible. Mr. Justice Brennan wrote for the Supreme Court:

> Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to

the cartelization or governmental regimentation of large portions of the economy. (374 U.S. at 372.)

The countries of Western Europe for reasons of their own fell away from these concepts and only in recent years have begun to embrace them again as a matter of necessity. The result in the field of banking was commented upon by the House Banking Committee in 1955:

> Your committee should like to reemphasize the fact that this is the only country left where most communities are served by home-owned and home-managed banks which are aware of and responsive to the needs of the people of their areas. Our independent banking system has been a vital factor in the development of the United States. Like yeast cells in a loaf of bread, each working in its immediate area, our banks scattered throughout the country have cooperated to produce the greatest and most general economic development the world has known.
>
> Other countries must depend on three, four, or five banks having up to thousands of branches. Policies and important credit decisions are made hundreds or thousands of miles from any of the branches. The interest of an enterprising local customer may run counter to that of a large main office account, in which event the former might suffer. This inevitably tends toward concentration in all lines, cartels, the stifling of new enterprises, and stagnation—what has been termed the "mature economy." (H. Rept. 609.)

Senator PROXMIRE. Is that still true? Are we the only country in the world that has this diversity of banks?

Mr. KIRKPATRICK. I believe so.

Senator PROXMIRE. Every other country has limited numbers, less than a dozen; in most cases, four or five.

Mr. KIRKPATRICK. I am told that is correct, yes.

Senator PROXMIRE. That is very impressive. I think that is a telling point, because of our vast economic superiority, the fact we do lead the world, and we have done it consistently.

Mr. KIRKPATRICK. I am told, in some nations there is just a single bank, a national bank.

The antitrust laws generally apply to the banking industry. Unlike the Federal Aviation Act, the Federal Communication Act, the Interstate Commerce Act, or the Shipping Act, no statute covering banks confers any express immunity from the antitrust laws. Citing a wealth of prior cases, the Supreme Court has said:

> Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. (374 U.S. at 350.)

Moreover, for the many years since 1914, section 11 of the Clayton Act has specifically given the Federal Reserve Board authority to enforce compliance with various sections including section 7, "where applicable to banks, banking associations, and trust companies."

The Supreme Court has made fully clear that the antitrust laws apply to banking (*U.S.* v. *Philadelphia National Bank*, 374 U.S. 321; *U.S.* v. *First National Bank & Trust Co. of Lexington*, 84 Sup. Ct. 1033). Commenting on the importance of preserving competitive freedom by antitrust enforcement in this field, the Court in the *Philadelphia* case said, at pages 371 to 372:

> In holding as we do that the merger of appellees would violate section 7 and must, therefore, be enjoined, we reject appellees' pervasive suggestion that application of the procompetitive policy of section 7 to the banking industry will have dire, although unspecified, consequences for the national economy. Concedely, PNB and Girard are healthy and strong; they are not undercapitalized or overloaned; they have no management problems; the Philadelphia area is not over-

banked; ruinous competition is not in the offing. Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary. It does require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry. The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so. At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation.

With regard to banking, it has been out consistent national policy that competition is to be preserved. This has been stated repeatedly in reports of committees in both Houses of Congress. Both Senate and House committees urged the adoption of the Bank Holding Company Act in 1956 as an added means of preserving competition and deterring concentration of control of banking resources.

Both that act, and the Bank Merger Act of 1960, were looked upon by Members of Congress as added means of preserving competition. In both instances the Senate and House committees were careful to point out that these proposals were not intended to replace the antitrust laws.

The antitrust laws should apply to banking for the simple reason that national policy requires vigorous competition in banking. The arguments now being advanced for exempting banking from the protection of these laws must be closely scrutinized.

Senator PROXMIRE. I am going to have to interrupt. I have an appointment at 12:30, and we will come back at 2:30. I do have a few questions to ask you. Would this be a good place to stop?

Mr. KIRKPATRICK. I think so.

Senator PROXMIRE. I apologize. You gentlemen were not able to complete your testimony this morning, but you will be given whatever time you need this afternoon.

We will reconvene at 2:30.

(Whereupon, at 12:30 p.m., the subcommittee recessed to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION

Senator PROXMIRE (presiding). The subcommittee will come to order.

We were hearing Mr. Kirkpatrick who was testifying before we recessed.

You may continue, Mr. Kirkpatrick.

Mr. KIRKPATRICK. All right, Senator.

One such argument is that because banking is regulated, there is no need for the antitrust laws in the field. This argument was vigorously advanced in the *Philadelphia Bank* case but rejected by the Supreme Court.

So, also, we reject the position that commercial banking, because it is subject to a high degree of governmental regulation, or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is somehow immune from the anticompetitive effects of undue concentration. Competition among banks exists at every level—price, variety of credit ar-

rangements, convenience of location, attractiveness of physical surroundings, credit information, investment service, service charges, personal accomodations, advertising, miscellaneous special and extra services—and it is keen; on this appellees' own witnesses were emphatic.

There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical.

For example, banks compete to fill the credit needs of businessmen. Small businessmen especially are as a practical matter, confined to their locality for the satisfaction of their credit needs.

If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish.

At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage vis-a-vis larger businesses with which he competes. In this fashion, concentration in banking accelerates concentration generally (374 U.S. at 368–370).

Moreover, although commercial banking is subject to a variety of governmental controls, the regulatory scheme does not cover many areas of banking and particularly is largely absent from the area of interrelation of bank and customer.

There is no banking control over interest rates a bank may charge; charges for banking services are free of governmental regulations.

Unlike certain other of the so-called regulated industries, banking is left free of control in numerous vital areas, such as the availability of loans and the rates charged for them.

Competition regulates the market forces in those areas, and that competition must be guaranteed its freedom by the protection of the antitrust laws so that it may perform its function.

The Supreme Court in the *Philadelphia Bank* case has described the extent of banking regulation in these words:

Moreover, bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject. Rate regulation in the banking industry is limited and largely indirect; banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business, place loans, and solicit deposits where they please.

The fact that the banking agencies maintain a close surveillance of the indsutry with a veiw toward preventing unsound practices that might impair liquidity or lead to insolvency does not make Federal banking regulation all pervasive, although it does minimize the hazards of intense competition. (374 U.S. at 352.)

If banking were to be immunized from the antitrust laws, there would have to be, in the public interest, far more direct and pervasive Federal regulation than has been proposed.

Although it is true that the presently proposed bill would exempt from the antitrust laws only mergers approved under the Bank Merger Act, still this novel legislation might easily be the first step to more extensive and complete regulation of the industry.

Considering only the narrower field of regulating bank mergers and consolidations, the record suggests that reliance on the regulatory agency alone to safeguard competition would be unwise.

As Mr. Brumbaugh's testimony showed, there were more bank mergers since the adoption of the 1960 act than in a similar period prior to the adoption of the act—which was enacted because of concern over the number of mergers.

This committee said in its report on the Bank Merger Act of 1960:

The large numbers of mergers in recent years, the vast resources involved in these mergers, and the increases in the size of the largest banks, particularly those which have grown through mergers, all give rise to concern for the main-

tenance of vigorous competition in the banking system and in the industry and commerce served by the banking system.

The reduction in the number of banks and the loss of competition between merged banks also give rise to concern.

The failure of the regulatory agencies to reduce the number of bank mergers raises serious doubts about the efficacy of the process. A leading authority in the administrative law field has written:

> An ineffective regulatory agency often goes through the motions of regulating * * * at the same time the agency is careful for the most part to regulate in the interest of the regulated, thereby silencing them.
>
> And we go on and on with our mixture of regulatory agencies, all of them varying from time to time in their effectiveness, some rather fully dominated most of the time by the regulated parties, others semieffective some of the time or much of the time, and hardly any fully effective over sustained periods. (Davis, "Administrative Law," 1958, sec. 1.05, pp. 43, 44.)

A second reason advanced in support of the exemption of bank mergers from the antitrust laws is that the Bank Merger Act sets out a number of criteria to guide the approving agency in deciding whether to approve a merger, whereas the Clayton Act ignores all but the competitive effect of the action.

Congress has directed the agency authorized to approve bank mergers to consider the banks' financial history and condition, adequacy of capital structure, future earnings prospects, general character of the management, convenience and needs of the community, and consistency of the corporate powers with the statute—as well as the competitive effect.

In applying the Clayton Act to such mergers, it is argued that no attention can be paid to any considerations except the last one.

It is submitted that these fears are more apparent than real. Years ago the Supreme Court recognized the so-called failing company defense to a section 7 charge, realizing that the acquisition of a company on its way to failure did not lessen competition. (*International Shoe Company* v. *FTC*, 280 U.S. 192.)

This failing company defense is still available under the new section 7. (See *U.S.* v. *Diebold*, 309 U.S. 654.)

So certainly the acquisition of a failing bank would not be condemned by the antitrust laws as a competitive restraint.

In addition, the Supreme Court has suggested that the failing company doctrine "might have somewhat larger contours as applied to bank mergers because of the great public impact of a bank failure compared with ordinary business failures."

However, the Court continued by saying that the question of what defenses in section 7 actions would be allowed in order to avert unsound banking conditions was not before the Court and it set out no views upon that problem. (See footnote 46 in the *Philadelphia Bank* case, 374 U.S. at 372.)

Certainly not all mergers run afoul of Clayton's section 7. In the landmark case of *Brown Shoe Company* v. *United States*, in which the Supreme Court laid down guidelines for determining the applicability of section 7, Chief Justice Warren said:

> At the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers.
>
> When concern as to the act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example a merger between two small companies to enable the combination to compete more effectively with larger

corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. (370 U.S. at 319.)

Accordingly, it may well be that bank mergers designed to prevent a bank failure, to provide better management, to cure problems of unsound assets or inadequate capital, to provide management succession or to alleviate destructive competition in an overbanked situation would not violate the standards of the Clayton Act.

It is clear that a court would apply Clayton Act standards to a bank merger only in the context of the banking industry and the particular facts of the individual merger. (See *Brown Shoe Company* v. *U.S.*, 370 U.S. at 321.)

The Department of Justice has filed suits under the Clayton Act to block bank mergers in only a handful of instances. Though Justice recommended unfavorably to the approving agency in 470 applications, it initiated only 7 suits.

This suggests considerable restraint. It seems clear that objections to a merger filed under terms of the Bank Merger Act seldom result in a court challenge under the Clayton Act.

A third argument to justify exemption of bank mergers from antitrust is that confusion in the law exists today and the situtation should be clarified.

It is quite clear that today the Clayton Act's section 7 applies to bank mergers, and that the Bank Merger Act of 1960 does not immunize approved mergers from challenge under the antitrust laws.

The Philadelphia Bank defendants even abandoned this latter argument on appeal before the Supreme Court. (See note No. 26, 374 U.S. 349.)

So, under present law, banks as well as concerns in some other regulated and all unregulated industries can merge only under the criteria set by the Clayton Act.

For example, companies which obtain the approval of the Federal Communications Commission of certain actions may find that these actions remain subject to challenge by the Department of Justice under the antitrust laws. (*U.S.* v. *RCA*, 358 U.S. 334.) And a pipeline merger approved by the Federal Power Commission as being in the public interest has been condemned under the Clayton Act. (*California* v. *FPC*, 369 U.S. 482; *U.S.* v. *El Paso Natural Gas Company*, 84 Sup. Ct. 1044.)

The chairman of this committee has recently suggested in an article in Banking, of May 1965, that it is time to end any doubt and uncertainty as to "old mergers."

It has been suggested that the doubts and uncertainty as to the validity of bank mergers which occurred before February 25, 1961, the day the complaint in the *Philadelphia Bank* case was filed, should be eliminated.

Whatever may be the merits of proposals on this point, surely there is no need to remove antitrust entirely from the field of bank mergers in order to accomplish this objective; a much less drastic remedy for any problem that does exist in this area can certainly be devised.

We do not believe that there are any valid reasons to immunize bank mergers, approved under the Bank Merger Act, from the antitrust laws. We believe that any practical problems which do in fact exist in this area can be met with a remedy far less drastic than antitrust immunization.

Senator PROXMIRE. Thank you very much.

I will be brief in my questioning, Mr. Kirkpatrick, because I know there are some gentlemen here who have to catch planes this afternoon. I appreciate very much your quoting from the *Philadelphia* case, because I think that is a landmark decision. It was very carefully reasoned. What was your position with the Department of Justice?

Mr. KIRKPATRICK. When I left the Department, I was the first assistant in the Division.

Senator PROXMIRE. You were in the Antitrust Division?

Mr. KIRKPATRICK. I was in the Antitrust Division. For about 2 months I was the Acting Assistant Attorney General.

Senator PROXMIRE. Did you try any of these cases?

Mr. KIRKPATRICK. None of the bank cases, no. I initiated two of them.

Senator PROXMIRE. Which ones?

Mr. KIRKPATRICK. *Philadelphia* and *Lexington*. I would prefer to say they were brought at the time I was head of the Division.

Senator PROXMIRE. At any rate, you were throughly familiar with them at that time.

Mr. KIRKPATRICK. Yes, sir.

Senator PROXMIRE. Once again I want to ask you, because you are an extraordinarily able lawyer, you have had very relevant experience in this area. On page 5, where you quote from the *Philadelphia* case, you say section 7 does not mandate cutthroat competition and does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary.

Now the question strikes me—I have been asking the Chairman of the Federal Reserve Board and I intend to ask the Comptroller General and FDIC the same thing, whether they are competent to handle antitrust matters. I would like to ask you if you think the Department of Justice has the competency to handle such things as whether or not an area is overbanked, whether there are dangers of liquidity or solvency. Isn't this beyond their professional competency? Do they have the kind of experience that would be most relevant and appropriate to evaluate these noncompetitive factors?

Mr. KIRKPATRICK. No, sir; and I don't think there is any suggestions that the Department of Justice would ever be the one who would make any final judgment on such factors.

Senator PROXMIRE. But what happens now, according to the proponents of this bill, is that the Department of Justice has a veto? They can say no, they can overrule, no matter what the other agencies find?

Mr. KIRKPATRICK. Senator, as you are well aware, the veto, if any, comes from the court. It comes from the court which decides on the basis of the law, after evidence is submitted to it.

Senator PROXMIRE. That is right; yes. I recognize that. It does come from the court, not the Department of Justice. But the Department of Justice makes the decision to bring the case. Then we go to the court. Has the court the competence?

Mr. KIRKPATRICK. The court has the competence to decide, guided by the best evidence available. The witness this morning, Mr. Brumbaugh, mentioned he had been a witness in the *Philadelphia*

case. I am sure the court never decides on the basis of its own knowledge, it decides only on the evidence presented to it.

Senator PROXMIRE. Well, you know, I suppose these fellows in the banking business—I was in it for a short time—but they claim, just like economists, that they are in a complex business, that you have to have years of experience to know what you are doing.

In view of the fact that you initiated the *Philadelphia* case, and maybe one or two other cases, do you feel it is possible for the courts and the Justice Department in concert to bring to bear sufficient proffesional competence?

Mr. KIRKPATRICK. Yes, sir. The Department can present to the court the appropriate evidence from appropriate sources. Much of this is documentary, some is oral testimony.

Senator PROXMIRE. Because on page 12 you go on to say:

> it may well be that bank mergers designed to prevent bank failure, to provide better management, to cure problems of unsound assets or inadequate capital, to provide management succession or to alleviate destructive competition in an overbanked situation would not violate the standards of the Clayton Act.

The question is whether the courts and the Attorney General are the proper people to make that judgment. I take it Senator Robertson and the authors of this bill may feel the banking agencies are the best people to do it, but you feel the courts are perfectly competent.

Mr. KIRKPATRICK. I would think it would have to be submitted in the last analysis to the court.

Senator PROXMIRE. Yesterday or the day before I was questioning a witness, and there was no contradiction of it, he told me this bill would simply take bank mergers away from judicial review entirely, take it right out from under the judicial process.

Mr. KIRKPATRICK. I think that is what would happen. There is no provision for a hearing under the Bank Merger Act. There need be no hearing. There could possibly be mandamus or something of that sort, but certainly not judicial review.

Senator PROXMIRE. At any rate you don't feel there is anything that makes banking so special, so complex, so unique, that it is any different than any other complicated business. There are many complicated businesses the Department of Justice and the Supreme Court and other courts have to handle, and banking is not so complicated that it is beyond the competence of a capable lawyer and judge; is that right?

Mr. KIRKPATRICK. I feel that is very true. I think the argument of how peculiar it is—I think I have heard in connection with natural gas pipelines, where the Federal Power Commission approved the El Paso acquisition and the Supreme Court held that despite the agency's approval, the merger had to be stopped because it violated the Clayton Act.

There are many peculiarities about that industry, gas pipelines, but whether it is more complicated than banking or not, I certainly don't know, but that is a pretty complicated industry.

Senator PROXMIRE. The Justice Department does not recommend action to the bank supervisor, that is, the Reserve Board or the FDIC, or the Comptroller under the Bank Merger Act, no authority is given to recommend action, it merely reports on the competitive factors involved.

Mr. KIRKPATRICK. That is right.

Senator PROXMIRE. It was the decision of the Supreme Court that this did not exempt banks from the section 7 of the Clayton Act.

Mr. KIRKPATRICK. That is correct.

Senator PROXMIRE. My question is, Do you recommend that it is necessary to change the law, to clarify it, so there is explicit authority given to the Department of Justice to recommend action?

Mr. KIRKPATRICK. No. I don't think so. I think I would not recommend any such change of the law.

Senator PROXMIRE. You don't think even in the cases where you find it has a most adverse effect on competition, that the Department of Justice should have the power to recommend against a merger?

Mr. KIRKPATRICK. It can always call to the approving agency's attention the facts and circumstances. But if action is to be taken I would suppose it should be taken by the Department in the normal course in court, which is where the Department belongs.

Senator PROXMIRE. Now on page 9 you say another witness will show—is that the preceding witness?

Mr. KIRKPATRICK. Yes, sir, Mr. Brumbaugh.

Senator PROXMIRE. I missed it. You say there were more bank mergers since the adoption of the 1960 act, than in any similar years prior to the adoption of the act; is that right?

Mr. KIRKPATRICK. I believe he testified as to the 3 years before and 3 years after.

Senator PROXMIRE. Three years after 1960 and 3 years before?

Mr. KIRKPATRICK. Yes.

Senator PROXMIRE. Did he go back? Well, I will examine his testimony. Thank you very much.

Mr. KIRKPATRICK. Senator, if I might comment for a moment or two. There is a chart which the court, the district court in the *Manufacturers Hanover* case, included as part of its opinion, which I think might be an interesting graphic representation of what is, as the court described it, "this demonstrates there is no mistaking a strong trend toward oligopoly" and then in the court's opinion are four pie-shaped charts showing the concentration of banking in the big five banks in New York and what is left for all of the other banks other than the big five.

Senator PROXMIRE. It doesn't take much training in economics to know that where you have this small number of banks, with this proportion of control, you definitely have oligopoly, by any definition. After all, oligopoly is more than duopoly, triopoly, or quadopoly.

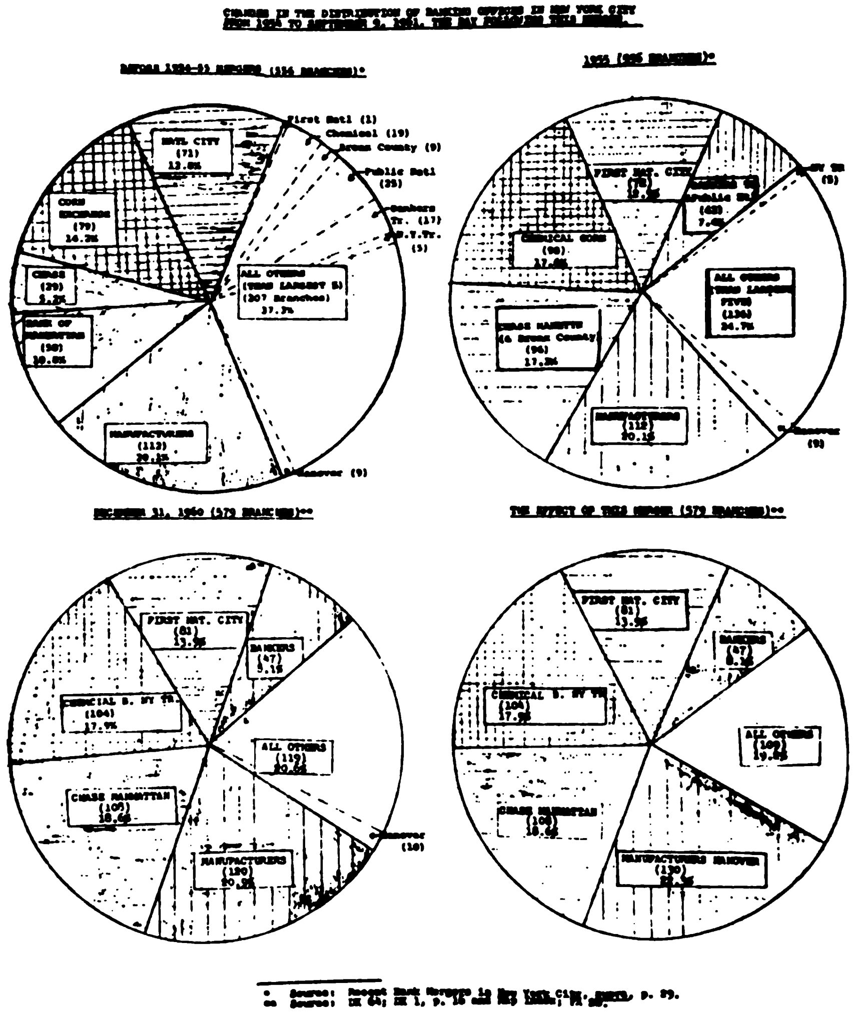
I think you could say that is something even more concentrated than oligopoly.

At any rate, you have such a small number of banks involved, they obviously are in a position to influence the price of banking services.

Mr. KIRKPATRICK. Yes, and these graphs show how that control is increased.

Senator PROXMIRE. That will go into the record.

(The graphs follow:)



Senator PROXMIRE. Our next witness is Mr. Ralph Zaun, president, Independent Bankers Association of America.

STATEMENT OF RALPH L. ZAUN, PRESIDENT, INDEPENDENT BANKERS ASSOCIATION OF AMERICA, AND EXECUTIVE VICE PRESIDENT, GRAFTON STATE BANK, GRAFTON, WIS.

Mr. ZAUN. Thank you, Senator Proxmire.

I am Ralph L. Zaun of Grafton, Wis., where I am executive vice president of the Grafton State Bank. I appear here as president of the Independent Bankers Association of America, an organization of 6,340 banks in 40 States. Our association was founded 35 years ago on the fundamental precept that vigorous competition among banks is essential to a sound banking system and a healthy ecomony.

Let me say at the outset that our association is well aware of the historic concern of this committee for the preservation of competition and the prevention of concentration in banking. This was made abundantly clear in the reports of your committee on the Bank Holding Company and Bank Merger Acts. This concern was reiterated in a recent letter to me from your chairman. It pleased me to note that your chairman inserted this letter in the Congressional Record.

We assume your committee and our association agree on the objectives as regards control of bank mergers. Apparently we have some differences as to methods for achieving this goal.

S. 1698 would exempt bank mergers from the application of both the Sherman and Clayton Acts and makes the decision under the Bank Merger Act conclusive as to any merger. The net result of passage of this bill would be to put reliance solely upon the administrative process prescribed in the Bank Merger Act.

The record shows that the Merger Act has been ineffectual. It has done little or nothing to slow the merger rate. This has occurred despite the fact that antitrust laws apply to banking.

At the time of the Bank Merger Act hearings, your chairman, Senator Robertson, said, and I quote, "The bill seeks to go further than the present law and to make it more difficult for banks to merge."

Senator PROXMIRE. Well, it did that; it did that by any interpretation.

Mr. ZAUN. No, sir, it did not. It failed in that purpose.

Senator PROXMIRE. It did that in the sense that before this bill was enacted, the authority to prevent merger was not clear and explicit in the law for the comptroller of the currency or the Federal Reserve Board or the FDIC. They may not have exercised their authority under the Bank Merger Act with sufficient effectiveness, but they have exercised it to some extent. Is that correct? Only the authority to stop merger was in the State bodies, by and large, so this 1960 act provided something that was not in the law before.

Mr. ZAUN. That would be correct.

Senator PROXMIRE. It may not have been effective, but it was at least a modest advance.

Mr. ZAUN. I would agree that is correct. It was certainly a well-intentioned proposal, that now has had 5 years of experience, and we can look at it now in the light of these 5 years of experience and draw our present conclusions, which are, it just hasn't worked.

Senator PROXMIRE. Well, there were 31 denials that wouldn't have been denied before, so I agree it is not much, I don't think you can make a case that it is a very emphatic record, but at least it is something.

I didn't mean to interrupt you, thank you.

Mr. ZAUN. We maintain this objective has not been achieved, and we feel it would be better to examine the Bank Merger Act with the goal of making it work better, rather than proposing to terminate application of the antitrust laws to banks.

As shown by your committee report in urging adoption of the act, its purpose was to fill gaps and loopholes, because the existing merger act and the antitrust laws were deemed inadequate. Since the act has failed to meet its purpose, we believe it would be prudent to

consider the type of corrections which experience teaches are indicated.

There are several apparent weaknesses in the act. First, the three regulatory agencies have divergent views on the purposes and application of the act. They are split on most applications and have similar views on very few. When this happens, there is no way to harmonize the divergent views. In most cases, the approving authority ignores the recommendations of other agencies and the Attorney General. The greatest confusion existing in the field of bank mergers is the confusion among the agencies themselves.

Senator PROXMIRE. Can you document that? I know there are cases, we had one example this morning of a case in which a merger was held valid, approved by the controlling agency and the other two disagreed. I wonder if you had documentation to show how common this is.

Mr. ZAUN. We have documentation of the Department of Justice, in which 470 opposition or opinions on the competitive aspects were submitted, as against 785——

Senator PROXMIRE. But you see in very few of those cases did they say they had a strongly adverse effect on competition. In many of those cases, the effect was mild. Presumably in many of those cases, the Department of Justice would have approved the merger, you can't tell. So you can't say they disregarded the recommendation of the Department of Justice.

Mr. ZAUN. This is true. The Department of Justice would admit they had several standards, very strong objections, and objections, and mild objections, lets's say. We have no way of knowing.

Senator PROXMIRE. It isn't an objection. They don't object. They don't recommend action. As I understand it, what they do is to simply make a finding and then it is up to the agency to act. Then if the Department of Justice feels it is a violation of the antitrust laws, it brings suit.

Mr. ZAUN. Yes, objection is not the right word.

Senator PROXMIRE. It is reporting on the competitive factors. I don't mean to nitpick, but I want to make sure we understand each other, that this does not constitute a recommendation, explicit recommendation, that the merger should be denied by the Department of Justice, all it constitutes is a finding that it has some effect on competition, mild, strong, moderate, whatever it is, and then the agency decides. There is no presumption whatsoever that the Department of Justice takes an adverse position.

I presume Mr. Kirkpatrick is undoubtedly the outstanding expert from the Department of Justice in the room. Is that statement about the report of the Department of Justice correct?

Mr. KIRKPATRICK. I think that is correct. The report from the Department to the agency comments on the competitive aspect and that is that.

Mr. ZAUN. I think there would be statistics available as to the relative opinions of the three regulatory agencies. However, we have not studied that in depth at this point. But we do find that very often two of the other agencies have interposed objections, or opinions that were not favorable to the merger, and the merger was still approved. I think this documentation would be helpful to your committee.

Mergers Con...

Do	do	... P			
Mar. 28, 1963	Mar. 29, 1963	The ... R	adverse.	do	Not adverse.
Do	Apr. 4, 1963	The ... Si	rse	do	Slightly adverse.
Apr. 2, 1963	Apr. 9, 1963	Firs ... C	adverse.	do	Not adverse.
Apr. 4, 1963	Apr. 11, 1963	The ... P	rse	do	Do.
Apr. 18, 1963	Apr. 25, 1963	The ... N	not significantly adverse.	Not adverse	Do.
Do	do	Firs	rse	do	Do.
Do	do	Far ... Fr		Slightly adverse	Slightly adverse.

[1] Advisory reports on the compe... approve or disapprove the mergers listed in this schedule. Thus, an advisory report described...

48-140 O - 65 (Face p. 172) No. 1

Bank Merger Act of 1960 (With Proposed Amendment)

Title 12, U.S.C., sec. 1828(c).—(Federal Deposit Insurance Act, sec. 18(c)).— Without prior written consent by the Corporation, no insured bank shall (1) merge or consolidate with any noninsured bank or institution or convert into a noninsured bank or institution or (2) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution or (3) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank. No insured bank shall convert into an insured State bank if its capital stock, or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholders' meeting approving such conversion, without prior written consent by the Comptroller of the Currency if the resulting bank is to be a District bank, or by the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank), or by the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank). No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). Notice of any proposed merger, consolidation, acquisition of assets, or assumption of liabilities, in a form approved by the Comptroller, the Board or the Corporation, as the case may be, shall (except in a case where the furnishing of reports under the seventh sentence of this subsection is not required) be published, at appropriate intervals during a period (prior to the approval or disapproval of the transaction) at least as long as the period allowed under such sentence for furnishing such reports, in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located (or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto). In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this Act. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection (which report shall be furnished within thirty calendar days of the date on which it is requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action).* The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: the name and total resources of each bank involved; whether a report has been submitted by the Attorney General hereunder, and, if so, a summary by the Attorney General of the substance of such report; and a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval. No insured

*(Proposed Amendment) If one such other agency or the Attorney General report unfavorably on the application, a public hearing shall be required. Such hearing shall be conducted by the approving agency in the county of the location of the proposed resulting bank. Banks in the competitive area which oppose the merger shall be admitted upon request as parties in the proceedings. The approving agency shall make its findings, conclusions and order as provided in the Administrative Procedures Act. An aggrieved party shall have the right of appeal to the Court of Appeals in the location involved or in the District of Columbia. If both such other agencies or one such agency and the Attorney General report unfavorably the application shall be denied.

State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

Senator PROXMIRE. Why don't you finish your testimony and I will see if I have the gist of it.

Mr. ZAUN. Even if the Merger Act is strengthened, we cannot afford to discard the basic remedies available in the antitrust laws, which are the ultimate weapon to prevent concentration and monopoly. These laws are an integral part of our system of free enterprise and protect the public interest. They constitute the ingredient in our society which makes us unique in the world.

For lack of such an ingredient, all of the countries of Western Europe have experienced a banking concentration that has placed control of money and credit in a few banks, with hundreds of branches.

As observed by committees in Congress, this concentration in Europe destroyed most small business. The large bank systems found it more convenient and profitable to make large loans to cartels and monopolies instead of making many loans to small business firms.

We could go a step further and observe that lack of the balance wheel of a middle class in Western European society deprives those countries of a stabilizing influence, both politically and economically. We do not want to have happen in America what happened in Western Europe. Let us therefore keep the ingredient which distinguishes us, let us keep the antitrust laws in full force and effect.

We are aware of the contention that banking is a specialized industry which requires specialized treatment under the antitrust laws.

We cannot agree with this. Historically, the only exceptions afforded by Congress to specialized industry is on the basis that it would not be feasible for those industries to submit to wide open competition. Thus railraods and power utilities are shielded. It is deemed improvident to allow duplication of the costly facilities serving the same area, as a general rule. It would be poor public policy, for example, to allow two power utilities to serve the same town, duplicating an entire network of powerlines, with the result that the public interest would be injured.

Banking has not yet reached that stage and, hopefully, it never will. Our national policy is still to preserve competition in banking, and as this committee has often stated "vigorous competition." Wherever we have vigorous competition in our economy, we desire to keep it so, and the assurance for this is the presence of the antitrust laws as the ultimate weapon against mergers that could lead to monopoly.

We feel that the cure for the uncertainty about use of antitrust laws in banking need not be so extreme as proposed in S. 1698. Banking is not regulated nearly to the extent of railroads and utilities, whose rates or charges are fixed by decree.

We still have competition as the primary regulator in banking. For example, competition is a dominant influence on rates paid or received by the public. There is no compelling reason for abandoning competition for strict regulation.

We should modify rather than remove the application of antitrust laws to banking as the ultimate regulator of a competitive system.

The proposal before you, to insulate bank mergers completely

from the antitrust laws, is drastic. The result could be the beginning of the end of meaningful competition in our banking system.

Concern has been expressed about the more than 2,000 bank mergers that have been completed since the Clayton Act was amended in 1950. According to some proponents of S. 1698, the Justice Department could "conceivably" challenge these mergers. For ourselves, however, the IBA believes that the chances that Justice will ever initiate any sizable number of suits against these mergers that have been approved and are now a part of the historic backlog, is extremely unlikely.

To clear the air and to end what many bankers regard as a confused situation, our association proposes modification, not termination, of antitrust laws as they apply to banking.

To quiet the fear that antitrust laws may be used against a merger many years after it has been completed, we propose consideration of the principle that an antitrust action to block a merger may be started only within a short period after the bank regulatory agencies have approved it. If the action is filed within the specified period, then the merger could not be consummated until court disposition of the case.

On the other hand, should the Justice Department fail to file an antitrust action within the specified time, it would thereafter be foreclosed from doing so.

As to mergers of an emergency nature, one required to salvage a failing bank, for example; it is well established there is no legal justification to challenge a merger made under these circumstances.

We believe the proposals I have made would be advantageous to banking, and we hope the committee will agree they are in the public interest.

Thank you for your kind attention.

Senator PROXMIRE. Mr. Zaun, these are very constructive proposals and I think it is an unusual statement, because so often it is helpful to hear witnesses who are opposed to legislation, but you have done more than that, you have made constructive alternative proposals, which this committee will consider seriously.

No. 1, you say if one of the three agencies makes an adverse finding you would have a hearing. Where two of the three find adversely, the application would be denied.

No. 3, you would continue to cover bank mergers with the antitrust law, but if the Department of Justice is to bring action, it must bring action within a period of 60 or 90 days, some short period.

And do I understand you to say that you would prevent or provide some provision in the law that would prevent the unscrambling process, that those who have now merged, you would forgive, something of this kind, so we wouldn't have this nightmare which is overhanging thousands or hundreds of banks now?

Mr. ZAUN. We were sure that question would come up and our position would be requested on that, therefore I have a short statement I will read on that question. Perhaps the forgiveness of past mergers is a price we must pay for not having had effective control of mergers. However, we would have some reservatoins to outright forgiveness of all past mergers.

While most all mergers since 1950 were conceived in the belief that no violation of law was involved, there are a few recent mergers

where this is not true. Also there are some pending court tests. So a blanket forgiveness of all past mergers may not be entirely in order. When we say all, we would include those in the courts. We have not had the time since the hearing was called, nor perhaps has the committee to study this carefully. However, we certainly would want to take a reasonable view on this matter of the sword of Damocles, as it is so often called, and I think it would be detrimental to banking to leave it remain.

Senator PROXMIRE. I think so too. I think one of the most practical objections to the present law, one of the strongest arguments for this bill, is the mess we have gotten into with the banking agency now able to recommend a merger and the Department of Justice coming along, and there is no limit, they can come along months later and file a suit against the merger, and unscrambling two banks that have been merged is worse than unscrambling an egg. You can't do it. It is almost impossible, and if any substantial period of time goes by, it is impossible, new accounts, and so forth.

But I think what you suggest here is very helpful and I hope maybe you and the staff can in a few days or a couple of weeks, before this is wrapped up and the committee marks this up, will consider the practical possibility of having some kind of amendment that would provide as much forgiveness as possible, recognizing that if we have an active court case, maybe we can't do it.

Mr. ZAUN. We would like to make it clear that our position is not to wreck the banks where proper mergers have taken place.

Senator PROXMIRE. Of course not.

Senator Bennett?

Senator BENNETT. I came off a plane and was late and have had no chance to get any background or even to read the early part of your statement. Since I came in, you testified you thought there should be a period of time after a merger is proposed during which the Department of Justice should have the right to object and thereafter be blocked from taking such action. How long a period do you think that should be?

Mr. ZAUN. Well at the time an application is received by the regulatory agency, it would be transmitted to the other supervisory agencies, and also to the Department of Justice. It would be under consideration by the proper regulatory agency or the proper approving agency for some period of months. Mostly it is 3 to 6 months in the hands of, say, the Comptroller or the Federal Reserve Board. During this time the Department of Justice would have equal opportunity to study with the regulatory agency the competitive factors which we feel they are so capable of studying, and passing upon, and then they would be immediately advised at the same time as the regulatory agency made a decision.

Now, if the decision was adverse to the merger, that would obviously end the matter. However, suppose the regulatory agency were to find in favor, and the Justice Department did not concur in that favorable response. It would then take under more serious study the competitive aspects of that particular merger. Now obviously they have that power now. But in our opinion, and I think in many people's opinion, this time for study and for bringing a court action is entirely too long. It is not prescribed by statute.

A great strengthening of the Bank Merger Act would be taking place if the Department of Justice were given a limited length of time to make its finding, and if the finding was still unfavorable, to bring suit. This would remove the sword from over the head of these banks.

Senator BENNETT. I understand all that. But I am asking how much time. You just said the Department of Justice is aware of the problem from the day of the application. Now how much time do you think they would need under those circumstances after the decision is announced, to keep the sword hanging, before they finally either sheathe it or let it drop?

Mr. ZAUN. We hesitate to tell the Department of Justice how much time it would need, but we suggest sometime in an area of 30 to 90 days.

Senator BENNETT. What was that?

Mr. ZAUN. Thirty to ninety days.

Senator BENNETT. Don't you think that is a little long, if they have had 3 to 6 months to study the problem? Do you think they have to start to study all over gain on the basis of the decision? Shouldn't they be prepared within 7 days after the decision has been made to announce the decision that they, themselves, have probably already arrived at, which would either be moot, or alive, depending on the decision of the bank regulatory agency?

Mr. ZAUN. Senator Bennett, I really think your committee and the Department of Justice would be better qualified to answer this matter of timing than we are. We are merely suggesting 30 to 90 days, feeling that 30 or even 60 days is not too long to wait for an important decision on the competitive factors. It would not work undue hardship on the bank's desiring to merge. After all it has taken them months to get to that stage and some reasonable length of time would not impose a hardship, I think. Obviously, it would not apply in the case of an emergency merger.

Senator PROXMIRE. As I understand it, the Attorney General now has 10 days in which, if he announces his decision, there will be no merging of assets. However, this doesn't foreclose him from bringing suit months later. What you would do is chop it off at 30 to 90 days, foreclosing his right to bring suit, or leave it up to the committee, but you suggest 30 to 90 days might be a reasonable time.

We might explore this with the Department of Justice.

Mr. ZAUN. We believe that is where it should come from, between your committee and the Department of Justice. We would feel presumptuous to give you a specified number of days. There are people better qualified to give you the answer to that question.

Senator BENNETT. But you think it should be at least 30?

Mr. ZAUN. I would think 30 days would be a minimum period of time, yes.

Senator BENNETT. I have no other questions, Mr. Chairman.

Senator PROXMIRE. It may be appropriate, without objection, to insert at this point any letters or resolutions from the Independent Bankers Association and from the State directors in opposition to the bill.

(The letters and resolutions follow:)

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
Sauk Centre, Minn., May 27, 1965.

DEAR SENATOR ROBERTSON: The Independent Bankers Association of America adopted the enclosed resolutions at its 1965 convention held recently in Hollywood, Fla.

We are sending these copies to you for your information.

Sincerely,

GENE MOORE, *Secretary.*

BANK MERGERS

A RESOLUTION

Adopted at the 31st Annual Convention of the Independent Bankers Association, Diplomat East Hotel, Hollywood, Fla., April 10, 1965

Whereas there has been newly introduced into the Congress legislation providing that the antitrust laws not apply to banking mergers; and

Whereas this legislation would, in effect, give a blank check to banking merger negotiation and agreement without regard to lessening of the competitive factors; and

Whereas the Department of Justice application of antitrust statutes has provided a most effective check against bank mergers that result in lessened competition in cities and communities served: Now, therefore, be it

Resolved, That the Independent Bankers Association opposes any legislation which would exempt banking mergers from the provisions of existing antitrust statutes.

DUAL BANKING SYSTEM

A RESOLUTION

Adopted at the 31st Annual Convention of the Independent Bankers Association, Diplomat East Hotel, Hollywood, Fla., April 10, 1965

Whereas we are in accord with our dual banking system which recognizes the autonomy of the States in banking matters, and are opposed to any further usurpation of these rights by the Federal Government; and

Whereas it has come to the attention of the resolutions committee of this association that officials of the Federal Reserve Board are recommending to the Congress certain changes in the laws of the United States, the effect of which would be to establish, among other things, a uniform reserve system to be applied to all banks regardless of whether such banks are members of the Federal Reserve System: Now, therefore, be it

Resolved, That the Independent Bankers Association does hereby declare that to extend the coverage, restrictions, and requirements of the Federal Reserve Act so as to include all banks and various types of organizations will endanger the time-honored system of dual control of the banking system of this country, and, in effect, place all banking organizations under the control and direction of the Federal Reserve Board, and consequently the Federal Government.

FEDERAL BANKING CENTRALIZATION

A RESOLUTION

Adopted at the 31st Annual Convention of the Independent Bankers Association, Diplomat East Hotel, Hollywood, Fla., April 10, 1965

Whereas legislation is presently being proposed through different sources and to varying degrees calling essentially for the centralization of all Federal bank chartering and supervisory activities in one department or agency; and

Whereas the association recognizes that there has been certain differences between the respective agencies, or their personnel, but that the present system has, for the most part, worked well: Now, therefore, be it

Resolved, That the Independent Bankers Association is opposed to any centralization or consolidation of Federal supervising agencies, in the firm belief that the further centralization of power in one department or agency could have an undesirable effect on the banking industry specifically and on the public welfare generally.

INDEPENDENT BANKERS ASSOCIATION,
Lapeer, Mich., May 29, 1965.

SENATE BANKING AND CURRENCY COMMITTEE,
Washington, D.C.

GENTLEMEN: We would like to go on record as being opposed to S. 1698. We feel the preservation of free enterprise banking is important to all of us in the banking profession, and particularly to those of us who are independent bankers throughout the United States.

With 14,000 banks in the country, 1 percent of this total holds about 50 percent of bank assets. We know no reason why this should be changed to make that percentage any higher than it is.

We know your committee will evaluate all arguments, but for the sake of the grassroots bankers, oppose S. 1698.

Very truly yours,

ROD L. PARSCH,
Executive Vice President and Trust Officer.

SPINK COUNTY BANK,
Redfield, S. Dak., May 29, 1965.

Re Senate bill S. 1698.

SENATE BANKING AND CURRENCY COMMITTEE,
Capitol Building, Washington, D.C.

GENTLEMEN: I am writing to you regarding Senate bill S. 1698 now before your committee and the harm it can do to the small banks over this country if it becomes law.

One percent of the banks now hold about 50 percent of the assets, and if this trend continues at the rate it has been going, before long a few big institutions will control all the banking operations in the United States.

It seems to us that this is the purpose of this bill and that big banks are promoting this through the American Bankers Association, and if the Department of Justice is eliminated from any part of this control, it will be a sad day for the small banker. This in time will eliminate competition entirely in the banking business.

I am interested in the preservation of free enterprise and strongly oppose the passage of this bill.

Sincerely yours,

H. T. HAYNES,
President, South Dakota Director, Independent Bankers Association.

Senator PROXMIRE. Our last witness is Mr. Harry Harding, representing the Independent Bankers Association, 12th Federal Reserve District.

We are looking forward to hearing you, Mr. Harding. We had, as you know, another distinguished Californian before us today on one side of the issue, and now we will be glad to hear your side.

STATEMENT OF HARRY J. HARDING, REPRESENTING THE INDEPENDENT BANKERS ASSOCIATION, 12TH FEDERAL RESERVE DISTRICT

Mr. HARDING. Thank you. Mr. Chairman, my name is Harry J. Harding. I am president of The First National Bank of Pleasanton, Calif., a $6 million independent bank. I appear in opposition to the enactment of Senate bill 1698. I represent the Independent Bankers Association of the 12th Federal Reserve District, comprising the nine Western States of Hawaii, Alaska, Washington, Oregon, California, Arizona, Nevada, Idaho, and Utah.

I might say, briefly, there are two independent bankers associations in the country, brought into being by problems that confronted their particular area of the country.

In our section of the country, not only did the States have statewide branch banking, but we have a holding company situation, where a holding company, in effect, was operating branch banking systems across State lines through that device.

It has been my privilege to testify before your committee a number of times and I thank you for the opportunity of again appearing before you.

Although the 12th Federal Reserve District comprises a large part of our country, our association membership is only 401 banks because, in our district, you see the inevitable results of easy bank mergers. In California, alone, eight banks have 79.2 percent of the banking offices and hold 92.2 percent of the individual, partnership, and corporation deposits.

Not all of these offices have been established through mergers, it is true, but a significant amount of this heavy concentration of banking control has been brought about by mergers and acquisitions that resulted in the elimination of hundreds of independent banks.

After listening to my good friend, John O'Kane, superintendent of banks of the State of California, this morning, I would conclude his statement was a very cordial and urgent invitation for small banks to merge with bigger ones, and I look for some sad results.

There has been a great deal in the press and in the testimony offered here to the effect that the intent of Congress in passing the Bank Merger Act of 1960 has been "nullified" by the decision of the courts in three of the seven suits brought by the Department of Justice under the act.

Our association has endeavored to set forth some of the arguments used on the floor of the Senate to win votes for this act, and as part of my testimony, without reading it at this time, I would like to include our newsletter dated May 12, 1965, which is attached to this statement, as part of this record.

Senator PROXMIRE. Without objection, that will be done. (See p. 184).

Mr. HARDING. You can see that over and over again it was stated the bill did not take the Attorney General out of the merger picture—that the powers he had were unchanged.

Regardless of what Congress intended—regardless of whether the courts misunderstood the will of Congress or not—the courts have spoken and the law is as they have determined. The move to take the bank mergers out from under the antitrust laws, then, is a new move, and should be looked upon as to what is intended to be accomplished.

We have contended on a number of occasions the question for Congress first to decide, is: What kind of banking system do we want in America? Do we want a system of highly centralized control of banks such as we have in California, and a number of other Western States?

With 1,516 bank mergers in the 10-year period, 1954–63, of which 475 were in the years 1961–63, after the Bank Merger Act became law, it will not take many years at this pace to have a group of large banks and only a few community-centered independent banks, and those playing a very unimportant part in our economy. Therefore, we believe the proper approach is for Congress first to determine the

kind of a banking system it wants in this country and to build toward that end.

Congress has repeatedly indicated its disapproval of monopolistic tendencies in banking by its actions; such as, by its limitation on branching of national banks to that permitted by the States; by the enactment of the Celler-Kefauver amendment to the Clayton Act in 1950; by the Bank Holding Company Act of 1956; and by the declared purpose of the Bank Merger Act of 1960, to make "bank mergers more difficult."

The test of the effectiveness of the Bank Merger Act of 1960 is not in the determination of the courts in the few suits instituted by the Department of Justice but, rather, in what has happened in the way of mergers since the act went into effect.

The record of mergers approved and the small number disapproved by the regulatory agencies best indicates the ineffectiveness of the act as far as making mergers more difficult is concerned.

Perhaps the reason for this failure to make bank mergers more difficult was the fact that regardless of the instances where the Department of Justice declared the proposed merger would substantially lessen competition or tend to create a monopoly, the respective bank supervisory agency involved could, and almost always did, approve the merger.

The removal of the Department of Justice from the merger picture by passage of the bill under consideration, which would take bank mergers from under the antitrust laws of the country, would not hinder the wave of bank mergers. It was this wave of mergers that caused the agitation for legislation in the first place, beginning on the House side with the Celler bill.

The real "teeth" in the Merger Act of 1960 is the fact that the Department of Justice has the power to bring legal action.

The requirement in the act that the supervisory agencies should also consider the competitive factor means that the proposed merger shall meet some unknown and undeclared standards of the respective supervisory agency.

With three agencies, all operating under different laws, and as shown over and over again in their rules applying to specific situations varying greatly in their interpretations, there can be no uniform standards of competition.

You then have a return to the conditions as they existed before the Merger Act became law. The obtaining of an advisory opinion of the Department of Justice under such conditions would be meaningless.

A competition of laxity among the agencies would be a result of exempting bank mergers from antitrust laws. As we point out, the refusal of one agency to approve a merger could lead to a move to reincorporate under a more lenient agency.

In a majority of the seven cases where suits were filed by the Attorney General, two of the bank supervisory agencies had reported unfavorably on the mergers and their views in each case were made a part of the record. In all cases the banks involved were informed by the Attorney General that, if the merger had been approved by the agency involved, suit should be filed.

In the Lexington case the banks involved chose to proceed with the merger. I might say today's copy of the American Banker shows that merger, the dissolution of the merger, the unscrambling of the

impossible, as we heard it declared, is about to take place. A plan has been submitted to the court, as I understood it, yesterday.

Likewise in the Manufacturers-Hanover Trust merger in New York this merger was consummated minutes before the suit was filed. In the Philadelphia-Girard Trust merger, the banks chose to await the outcome of the court case.

Therefore, in the two cases involving "unscrambling," the banks were plainly on notice of possible consequences. Now that the court cases have gone against them they are in no better position than any individual, or small bank, or company that acted under similar circumstances.

If the bill under discussion was not a means of salvaging the Manufacturers-Hanover merger, particularly, there would not be the haste so evident in rushing action on this proposed legislation.

Considerable concern has been expressed by a representative of the American Bankers Association that—

> Without getting too far ahead of myself, I should note that over 2,000 banks across the country could conceivably end up in court over mergers unless this whole question is solved once and for all. No, I am not trying to tell you that the Justice Department plans to follow so foolish a course, but the mere fact that over 2,000 past mergers could be challenged should demonstrate to you the urgency and absurdity of the situation.

This may be good propaganda. It should stir up the banks involved and produce 2,000 letters to this committee endorsing the bill.

Senator Javits probably supplied the answer to this, when in the course of the debate on the bank merger bill, he declared—

> * * * The Attorney General is not obliged to bring every case. He brings a case when he determines that the public interest requires it.

During the Senate committee hearings on the bank merger bill, the American Bankers Association indicated in its testimony that there would be situations in which—

> approval of the merger would be in the public interest, even though this would result in a substantial lessening of competition.

In its report on the merger bill, No. 196, on pages 19 and following, your committee recognized this fact.

The following examples of such situations were mentioned:

(1) Where there is a reasonable probability of the ultimate failure of the banks to be acquired.

(2) Where because of inadequate management the acquired bank's future prospects are unfavorable.

(3) Where the acquired bank is a problem bank, with inadequate capital or unsound assets, and its acquisition by another bank would be the best practical means of dealing with the problem.

(4) Where the acquired bank has not adequate provision for management succession, or its management is incompetent.

(5) Where the acquired bank is an uneconomic unit, or is too small to meet the needs of its community, by providing loans of sufficient size or by providing needed banking facilities.

(6) Where several banks in a small town are compelled by an an overbanked situation to resort to unsound competitive practices which may eventually have an adverse effect upon the condition of such banks, and the merger of the two or more banks would, therefore, be in the public interest.

Congressman Celler testified, agreeing that mergers in such situations may be exempted from the antitrust provisions, just as a bank is taken care of when in a failing condition. Our own Association heartily recorded its approval of the elimination of such situations from the provisions of the act.

Although Congress did not see fit to provide for these exemptions in the 1960 act, we still feel these exemptions should be stipulated.

We still look upon this as a practical approach to solving the problem, and are of the opinion that study be given to situations not included above, but which by reason of the past 5 years of experience with the act, should be excepted. This is far better, in our opinion, than a blanket exclusion of all past mergers from the antitrust laws.

In his testimony before this committee a few days ago, Chairman William McC. Martin, Jr., of the Board of Governors of the Federal Reserve System concluded by saying:

> The Board's report also mentioned the possibility of some other approach to the problem should the Congress be unable to agree on the approach proposed in your bill. As the report pointed out, one such possibility would be to amend the Bank Merger Act to allow a specified time within which an antitrust action might be brought to prevent consummation of an approved merger and, if such an action were not filed during that time, the merger would be consummated and would be exempt from any proceeding under the antitrust laws. Because the Attorney General receives ample notice of pending mergers under the procedures of the Bank Merger Act for advisory reports, the specified period in any such alternative approach should be relatively short.

Although Chairman Martin also points out that this would be a less positive approach, and two arms of the Government might work at cross purposes, the suggestion, we believe, has merit and justifies further study.

Its enactment, together with the exclusion from the antitrust laws in situations mentioned above, would go a long way to avoid the distressing uncertainties stressed by the proponents of complete repeal of the antitrust laws as to bank mergers.

Certainly, their enactment would dissipate any assumption that bankers may have that the bill before your committee primarily is aimed at salvaging the Manufacturers-Hanover Trust merger.

Our conclusion is that S. 1698 in its present form should be defeated, but that any strengthening of the Bank Merger Act that will help bring about making concentration of banking control through mergers more difficult, should be enacted.

The May 12, 1965, News Letter of the Independent Bankers Association, 12th Federal Reserve District, is attached for the record.

(The attachment follows:)

[News Letter of Independent Bankers Association, Pleasanton, Calif., May 12, 1965]

Bank Merger Act to the Fore

In recent weeks there has been a terrific uproar from the ABA severely criticizing the Supreme Court of the United States and other courts because of their interpretation of the Bank Merger Act of 1960. There was the decision in the Philadelphia National merger case when Senator Roberston and some others criticized the decision of the court, but aside from the volcanic vituperation and criticism nothing more was done. In the case of the Lexington, Ky., decision calling for divestment of the banks involved in that merger, there, too, was some criticism but no legislative action was taken to nullify the court's action. But a few weeks ago, when a third court determined that the New

York merger of Manufacturers-Hanover Trust was also in conflict with the antitrust laws of the country, then a big howl was set up.

For many years prior to 1960 bank mergers had been taking place with the approval of the bank supervisory agencies, State and Federal, and in many cases without any approval being required. Gradually a pattern of monolithic banking aggregations took place, some banks like a many-time-wedded bridegroom appearing at the altar over and over. Some governmental leaders became greatly concerned. Not by initiation of leadership of the Banking Committees of Congress nor of the Federal supervisory authorities was any action taken to check this trend, which if continued would have wiped out our American system of diffused control of banking, except that the Board of Governors of the Federal Reserve System did bring action against Trans-America. The House Committee on the Judiciary, under the leadership of Emanuel Celler did take action.

In 1950 the Celler-Kefauver bill to amend the Clayton Act was passed. This covered bank consolidations through the purchase of stock, but failed to cover bank mergers accomplished by means of asset acquisition. With this loophole existing, you can imagine that subsequently prectically all bank mergers were by asset acquisition. To plug this loophole Chairman Celler proposed his bank merger bill amending the Clayton Act, so that it covered all bank mergers by what ever means accomplished.

In 1956 the House approved this bill without dissent.

It was after this action by the House that certain forces became active on the Senate side in an effort to head off this legislation. They did succeed in delaying action and the bill died. Subsequently the Senate Banking and Currency Committee offered a much milder version of a merger bill. After some strengthening amendments urged by the two independent Bankers Associations were approved, and some changes made on the House side, the bill finally succeeded in being enacted as the Bank Merger Act of 1960.

MERGER WAVE CONTINUES

Although Senator Robertson declared a purpose of the bill was to make mergers more difficult, bank mergers have continued under the new law unabated with 130 mergers in 1960, 147 in 1961, 183 in 1962, and 159 in 1963. In the period from 1950 (enactment of the Celler-Kefauver Act) to 1963, 2,129 bank mergers took place. The number of banks actually participating in these mergers are far fewer because some banks had taken part in as many as 20 mergers.

The Justice Department has intervened in only seven cases which they deemed in violation of the antitrust laws of the country, one of which was settled out of court and three of which had been passed upon by the courts as referred to above. In a majority of the situations where suits were started, two of the banking agencies disapproved the merger and their opinions were entered in the testimony.

MISUNDERSTANDING?

Senator Robertson on April 5, 1965, in introducing S. 1698, a bill to repeal the antitrust laws as to bank consolidations, stated, "Mr. President, I introduce for appropriate reference, a bill to eliminate misunderstanding, confusion, and controversy which we now find in the bank merger field. * * * At the time the Bank Merger Act of 1960 was adopted, it was generally agreed—in fact I think it was fair to say that it was universally agreed—that the restrictions of section 7 of the Clayton Act did not apply to bank mergers and I think it was universally recognized that the decision of Congress was against making section 7 of the Clayton Bank Merger Act applicable to bank mergers. * * * In 1960 it was also generally recognized that the Sherman Act—if it applied to banking and bank mergers at all—had not proved effective to prevent bank mergers and was no protection to the current wave of bank mergers."

How universally was this recognized? Not by the Department of Justice; not by the courts; not by the independent bankers; not by many of the Senators whom we will quote.

Senator Robertson seems to have overlooked that in presenting the committee report urging enactment of the bank merger bill, S. 1027, Report No. 196, he declared, "The purpose of the bill is to provide for control of *all mergers by asset acquisition by banks* under the jurisdiction of the Federal banking agencies." [Italic supplied.] Thus the Senator did recognize the Clayton Act did apply to bank mergers other than by asset acquisition.

SENATOR ROBERTSON ASSAILS COURTS

The *Manufacturers-Hanover Trust* decision, on top of the *Lexington* and *Philadelphia* decisions, all in favor of the Justice Department's position has thrown a number of large merger-minded banks into a real tizzy. We can understand the panic that has been created in the minds of these bankers over these decisions. But in each of these cases the banks were all aware of the Department of Justice's views as to the monopolistic aspects of their proposed mergers.

Suppose in each of these cases the courts had decided against the judgment of the Department of Justice and had held that these mergers were not in violation of the country's antitrust laws. Would there then be any clamor to alter the Merger Act of 1960 and to repeal the antitrust laws as affecting all bank mergers? Would there be any "quaking in the boots" by bankers whose mergers are still to be passed upon by the courts? Is the outcry so much about "confusion" and "quagmires" and "nullification" of the will of Congress anything but a plea for special class legislation to bail out a few big banks?

Senator Robertson in charging that the Supreme Court had rewritten the antitrust laws and "nullified" the intent of Congress, has introduced a bill which in effect would in turn nullify the Court decisions that he criticizes. His bill proposes to exclude bank mergers from the antitrust laws of the country and would forbid new antitrust action against mergers that were consummated prior to May 13, 1960.

This proposal would leave the authority to approve mergers solely with the bank supervisory agencies and would prohibit any and all proceedings under the antitrust laws. The present law requires the respective supervisory agencies to obtain the written views of the Department of Justice as to the competitive aspects of any merger. What would be the sense of obtaining such an opinion when it would be meaningless and the Justice Department would have no power to take action regardless of how monopolistic the merger may be? Or is the Robertson bill also an indirect repeal of this provision?

Let us suppose the antitrust provisions of law, as urged by Senator Robertson, are enacted. Let us assume that the Department of Justice in its advisory opinion indicates that from the competitive standpoint the merger would lessen competition and tend to create a monopoly. As to the banking factors, let us assume that the Federal Reserve Board and the FDIC indicated approval. The resulting bank, being a national bank, would be subject to the final approval of the Comptroller of the Currency. But the Comptroller of the Currency in view of the Justice Department's opinion may have grave questions as to the proposed merger being in the public interest. Let us look at the situation as it is expressed in the report of the Senate Committee on Banking and Currency No. 196 in which the bill, S. 1062, was urged for enactment. "* * * A refusal by him to approve a merger may merely result in the surrender of the national bank charter and the reincorporation as a State bank. * * * Under such circumstances it is difficult to expect the Comptroller to take a strong stand against such a merger."

REPUDIATION OF CONGRESSIONAL INTENT?

Were the Court's decisions repudiation of congressional intent? As the Court in the *Philadelphia* case and again in the *New York* case indicated, if Congress had wanted it could have inserted in the Bank Merger Act a few words that would have repealed the antitrust laws as to banks. Why didn't the Senate Banking and Currency Committee urge repeal? Was it because of the overwhelming support of the Celler bill in the first place on the House side and the strong support indicated for the Sparkman bill, quite similar, on the Senate side?

Your association followed the hearings and debates ever since the first bank merger bill was introduced by Chairman Emanuel Celler of the House Committee on the Judiciary. We do not recall a single instance where repeal of our antitrust laws was proposed. We did suspect that there was an attempt indirectly to nullify the antitrust laws. Your representative questioned authorities in Washington whether these apparent effects could nullify present laws and was repeatedly assured indirect repeal of laws could not be accomplished. Judge MacMahon in the *Manufacturers-Hanover* case confirmed this. He explained that, "In leaving bank mergers subject to the antiturst laws, Congress intended that their validity should be definitely judged, not by the banking agencies, however expert in the bank field, but by judges presumably skilled in antitrust adjudication." Judge MacMahon also says that Senator Fulbright had stated

it was intended by Congress "To make crystal clear its intention that the various banking factors in a particular case may be held to outweight the competitive factors and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision." But Judge MacMahon determined the act failed to make this intention clear. He says, "The absence of an expressed exemption from, or repeal of, the antitrust laws, and the failure of the act to provide for adversary hearings led the Supreme Court of Philadelphia 'The *U.S.* v. *Philadelphia National Bank*, ruling by U.S. Supreme Court, June 16, 1963,' to the conclusion that since repeals by implication are not favored neither the Bank Merger Act nor agency approval of a merger, immunize the merger from challenge under the antitrust laws."

During the floor debate on S. 1062, Senator Javits made it clear there was no intention of taking away any of the rights and powers of the Attorney General as they then existed. He said, "Mr. President, I should like now to sum up the situation. The legislative history is now very clear that the bill which is before the Senate does not deprive the Attorney General of jurisdiction either under the Clayton Act or under the Sherman Act * * *. 'But the legislative history is clear that nothing is taken away from the Attorney General.' My friend, the Senator from Tennessee, argues that a different standard is established for the Attorney General in stock acquisition cases than is established for the regulatory agency. I see nothing wrong in that. The Attorney General is not obliged to bring every case. He brings a case when he determines that the public interest requires it. This bill will not inhibit him from bring a case, and so, it seems to me, the antitrust provision, insofar as the Attorney General is concerned, is fully safeguarded."

At another point in the debate on the bank merger bill of May 14, 1959, as it appears on page 7295 of the Congressional Record of that date, the late Senator Kefauver raised the point with Senator Robertson saying, "* * * The Senator from Virginia says that the Attorney General is still in the picture, under section 7 of the Clayton Act. That was his statement. He said the Attorney General could still bring suit, just as he brought suit in California." (California Bank-First Western merger.)

Senator Robertson's reply to Senator Kefauver was, "*The Senator from Virginia says that he does not take the Attorney General out of the picture. Any rights which the Attorney General has with respect to the antitrust laws he would continue to have under the bill.*" [Italic supplied.]

Another argument raised by the advocates of free-and-easy merger was commented on by Senator Proxmire during the May 14, 1959, debate and we quote:

"The other point which the Senator from Virginia raised, and raised with great effect, is that banking is different from industrial business. Banking is different from the automobile industry. It is a regulated industry; therefore, it takes on some of the case of a utility.

"It seems to me that that argument does not have substantial merit, because the distinctive feature of regulated utilities, and the reason why *they can be permitted to operate as monopolies*, is that the rates which they charge the public are regulated, fixed, established, and limited by law. Of course, there is no provision of law to limit the charges which a bank makes to the public. There is no provision of law which limits its interest rates. Banks are free to compete among themselves. Their interest rates vary from bank to bank. Because they have that freedom, it seems to me the analogy of saying that a bank is a utility, and that therefore it can and should combine and should be permitted some degree of concentration, falls to the floor." [Italic supplied.]

ABA ACTIVITY

When bank merger legislation was first proposed the ABA vigorously stated that no legislation was necessary, that the discretion of the supervisory agencies was sufficient to meet the situation, notwithstanding the record of the many mergers approved by these agencies with practically no disapprovals. But the ABA was not speaking for the grassroots banks of the country even if it did represent the views of the monolithic banks. The two independent bankers associations representing about half the banks in the country over the years have steadfastly supported legislation to check monopoly in banking and that would keep the Department of Justice in the bank merger picture. The ABA's adherence to the views of the big merger-minded banks of the country and complete failure to consider the views of the independent community-centered banks no doubt prompted Senator Robertson in speaking on S. 1062 to state "* * * It has been

endorsed by the American Bankers Association. It has been endorsed by every agency which deals with banks. Yet the Senator from Tennessee tells us that he cannot understand how all those experts on banking could reach the conclusion that this is the proper way to handle the matter and that he does not understand how the banks could possibly function under such legislation.

"I can tell the Senator from Tennessee that the *officials from every bank with which I have had contact* have said. 'If you are going to apply the O'Mahoney test to us or if you are going to apply the test of the term "substantially lessen competition" to us, we do not want any legislation at all enacted.'" [Italic supplied.]

Supporting the present move to salvage the Manufacturers-Hanover Trust merger, the American Bankers Association has rushed to the support of the bill introduced by Senator Robertson repealing the antitrust laws. The president of the ABA described the existing situation as "chaotic." The Robertson bill, he claims, offers a way out of the "absurd" situation.

He also went on to say, "Now, I am not a lawyer and I can get bogged down as easily as anyone in the whereases and hereinafters, but *there wasn't anything in the statements about the intent of Congress that a 10-year-old could not understand. They simply said bank mergers are exempt from section 7 of the Clayton Act.*" [Italic supplied.]

That's putting it strongly, saying the Justice Department and the Supreme Court of the land are less intelligent than a 10-year-old. And the president of the ABA probably has not read how some of the Senators interpreted the Bank Merger Act of 1960 as taken from their remarks during the debate on the floor of the Senate.

What the prospects of action on Senator Robertson's proposal of nullification of the Court's decisions is anyone's guess. But a weekly banking letter published in Washington and widely read by bankers asserts this move will result in a battle between the big banks and the little banks with action probably a standoff as far as this session of Congress is concerned. Our own guess is to quote the last paragraph from the Senate committee minority report on the merger bill of 1960:

"But we wish to add a word of caution to the Federal Reserve Board, the Comptroller of the Currency, and the FDIC. Their acts will be closely scrutinized by Congress and the country and, if it should appear that they continue to disregard the need for competition in banking, then at least some Members of Congress will urge that stronger powers be provided to the Department of Justice."

Let's get back to basics. As Senator Robertson has stated, the purpose of the bank merger bill was to make mergers more difficult. We are 100 percent in accord with that, except where a merger is clearly and strongly in the public interest. The teeth in the existing 1960 act is the fact that the opinion of the Attorney General must be obtained and the antitrust laws do apply to banks. This law would be meaningless if the supervisory agencies could completely ignore the Attorney General's opinions and if no one would be able to take legal action in opposition. The antitrust laws at present are the real and only restraint on a merger-minded supervisory agency.

We have confidence in the courts and their ability properly to interpret the laws passed by Congress.

To summarize, we contend—

(1) That the Court decisions under the Sherman and Clayton Acts were in accordance with the laws of our country and do not represent any "nullification" of the will of Congress.

(2) That the repeal of the antitrust laws as far as banks are concerned would return merger approvals solely to the final discretion or the respective supervisory agency.

(3) That regardless of the extent to which a proposed merger may result in lessening competition or tend to create a monopoly and regardless of how strongly the Department of Justice might express its disapproval because of the compteitive factors, if the Robertson repeal was enacted, the supervisory agency could do as it pleased, and because of the power of a bank to reincorporate bringing it within the scope of another supervisory agency, he would be sorely pressed to approve a merger.

(4) That in the face of such a decision by the supervisory agency, no appeal or request for court review or other legal action would be possible.

(5) That any supervisory agency if it wished, could through approval of mergers, destroy the American system of competitive banking.

(6) The Robertson repeal bill S. 1698 should be defeated.

Inertia can mean disaster—the elimination of independent banking as an important factor in our economy. Action is needed—quickly.

We urge you at once to write or wire—your two Senators; your Congressman; the Senate and House Banking and Currency Committees—urging defeat of S. 1698—the proposed repeal of antitrust laws as to banks. Please send your association copies of any letters you may write. But rush.

Senator PROXMIRE. Thank you very much, Mr. Harding, for a thoughtful and logical statement and also for your constructive suggestions which support the position taken by Mr. Zaun earlier.

You said something about competition of laxity among agencies. You seem to feel if this were left as the proposed bill would do to the various agencies, that they would compete to see which could be the most lenient in action on mergers. Why would they do this? Would there be any reason or motivation?

Mr. HARDING. Yes, sir; there could be a competition of "laxity." I think the head of any of the banking agencies is interested in the welfare of the banks under that particular agency's supervision. I think you pointed out in the debate on the floor of the Senate a hypothetical situation whereby a bank seeking to merge under conditions where the supervisory agencies would practically have the sole say, and let's say the Federal Reserve in the case of a State member bank was inclined to disapprove that action, there could be a tendency on the part of the bank to reincorporate under the National Bank Act, if the Comptroller by his actions had indicated a laxity in approving mergers.

Certainly in the case of California, let's say that if the Comptroller of the Currency frowned on mergers, and Mr. O'Kane, the Superintendent of Banks, welcomed it. The tendency would be for them to shift over to his supervision, if they wanted to merge.

Senator PROXMIRE. You think there is a tendency on the part of the Comptroller to try to stimulate more national banks?

Mr. HARDING. I would not want to say what may be the thinking of any of the heads of the supervisory agencies at the moment. But Gov. J. L. Robertson testifying on the Robertson plan to provide for a bank commission, did stress that fact—that there could be, in our situation as we have it today, a "laxity competitive" situation.

Senator PROXMIRE. You seem to feel that California—and you are very familiar with California——

Mr. HARDING. Yes, I hope so.

Senator PROXMIRE. There is a growing concentration of banking in California; is that right?

Mr. HARDING. There is a tremendous increase in population and other factors——

Senator PROXMIRE. Banking competition is not adequate?

Mr. HARDING. Competition between the five largest banks may be quite intense. But those banks set the pace for the rest of us. We can't compete with them. We can only follow them.

Senator PROXMIRE. Let me read something to you from a report by Governor Brown, because I think it would be helpful to have an expert witness from California comment on this. This seemed to me to be rather persuasive that competition is strong out there.

Maybe this report is biased, but I would like your opinion. This report is dated January 26, 1965, and on page 21 it says:

So far as the basic requirement of competition is concerned; namely, the existence of alternative places of doing business, it appears that the trend during the past decade has been toward a decline in concentration of banking positions

(which suggests an increase in competition) in California towns and cities, with an actual decline in nearly half of the communities surveyed and no change in the rest. Even for customers who wish to do business with banks having a statewide system of branches, there are increased alternatives to assure that competition will not be lacking.

Subjectively, it is the opinion of the banking community that competition among banks is lively and widespread and that this has led to a balance between safety and risk which has contributed to banking strength and economic growth in California. The dominant position of the branch banking system in the State has led to a rapid proliferation of total banking offices, even while the number of unit banks in the State was declining for a time. It is the opinion of this committee that competitive pressures which exist in the major markets have worked their way through to most California communities of whatever size and to the benefit of most California borrowers.

Is this wrong?

Mr. HARDING. I wouldn't agree 100 percent to that. If you are talking about—and I guess you should talk about the big banks in California, that hold 92 percent of the banking assets, those eight banks do compete among themselves, I am sure.

Senator PROXMIRE. But you see this says it has worked into most communities, of whatever size, and for most borrowers, small business as well as big business.

Mr. HARDING. That probably is correct, in that branches can be established far more easily than an independent bank. In our own situation we have two branches of large chains to compete with; 5 miles away we have three branch bank systems. The two towns sort of overlap. And in another town not too far away, we have one other branch system. The branches have expanded in number tremendously and they have given more competition to independent banks, in that sense. But at the same time——

Senator PROXMIRE. This is a healthy thing, isn't it?

Mr. HARDING. Well——

Senator PROXMIRE. It is healthy for the borrowers, and depositors, certainly. They have alternative sources, places where they can borrow and invest their money.

Mr. HARDING. They have alternative sources, by reason of having more branch banks compete with other branch banks, that is true. But the same result would be accomplished if you had more independent banks, and to a greater degree. Let's say that there are, say, three branches of the Bank of America in our immediate area, to which you can go. If you are turned down by one, you are turned down by three. If you had four independent banks, ourselves and three others, you would have four avenues to credit.

Senator PROXMIRE. I see. Your argument is you are limited in the fact that it is two or three statewide corporations or statewide banks that do this and, if you are turned down there, you are out of luck.

Mr. HARDING. That is correct.

Senator PROXMIRE. That is quite a few different sources, though. In most smaller towns throughout the country you are pretty lucky if you have two alternative sources.

Mr. HARDING. I think the concentration in banking is similar to automobile concentration. You have 4 larger automobile concerns, I would say, and, if you have 4 large banks with many branches, you have just 4 avenues to credit and, if those 4 banks control all of the assets of a State, you have only 4, even though they may have 10,000

offices. But if you had 10,000 independent banks, you would have many avenues to loans.

Senator PROXMIRE. Would you agree with Mr. O'Kane that merger is about the only practical way you can establish competitive statewide banking systems? He indicated this morning, as you will recall, that if you are going to have further competition for the Bank of America and other big banks, as a practical matter, you can't do it de novo.

You can only do it by combining established banks. The only way you can do that is by merger.

Mr. HARDING. You are talking about statewide competition now?

Senator PROXMIRE. That is correct.

Mr. HARDING. If you want to compete statewide, you have to go into practically all of the communities in the State, of course.

Senator PROXMIRE. I wouldn't say that. It could be in a representative number, in all of the big ones.

Mr. HARDING. All right, a representative number. The Bank of California, with its head offices in San Francisco—no branch very far away from San Francisco—recently established a de novo branch in Los Angeles to serve the southern part of the State. Now it is true the presumption is that they will establish a nest of branches radiating from that Los Angeles headquarters. I don't know whether they will be de novo branches like the Los Angeles branch was or or they will endeavor to pick up banks. I was reminded as I listened to the chairman this morning about what happened to the small steel company in his area, when the big company wanted to buy him out. He wouldn't sell, so they put a branch in there and undersold him. We have seen that happen in California. If you wouldn't sell the bank, you found a branch opening pretty close by.

Senator PROXMIRE. Let me ask you one more question: Would you recommend making it easier to charter new banks, or to approve new branches?

Mr. HARDING. When you say "easier," so many factors enter into it.

Senator PROXMIRE. We want to do it on a sound basis but make it easier than it has been.

Mr. HARDING. Well, I think the chartering laws need some study and possibly overhauling. For instance, a bank's capital is established by law according to the population of a city and yet we find a city broken up into many residential or shopping areas, where a neighborhood bank confined to a neighborhood business, a small bank, might be justified and certainly wouldn't be warranted in having the capital investment of a large downtown bank doing citywide business.

I do agree that management is an important factor, as Mr. O'Kane said.

Senator PROXMIRE. Senator Bennett?

Senator BENNETT. Mr. Harding, there are one or two questions that have been going around in my mind since you began to testify, and remembering the testimony of Mr. Zaun—that part which I heard—any program which requires a waiting period, during which the Department of Justice can step in, in practice gives the Department of Justice the last word and an effective veto on any bank merger. Isn't that the effect?

Mr. HARDING. A veto only on those it disapproves.

Senator BENNETT. Well, we know they are not going to veto those they approve. But if they decide to disapprove a merger, which presumably, to draw an extreme case, has had the unanimous approval of the other three agencies, we are giving them the last word?

Mr. HARDING. Through legal action, I agree.

Senator BENNETT. I see Mr. Zaun doesn't like that. Do you want to say something?

Mr. ZAUN. Senator Bennett, I think we weren't completely clear on that. The time factor was time only during which the Department of Justice could bring suit. It would not have the last word. The courts would have the last word. Now, in that time period, if the Department of Justice failed to bring suit, it would be forever foreclosed from doing it.

Senator BENNETT. But, in effect, if you were a part of a negotiation to merge two banks, and you were told the Department of Justice would bring suit if you merged your banks, the chances of your carrying through that merger would be a lot less perhaps than the chance that manufacturers went forward in the face of a suit; because many banks, particularly small ones, can neither face the financial nor the public relations effect of a suit. So, in practice, aren't we talking about an effective veto on the part of the Department of Justice, as effective as if they had the power to say, "No; this merger cannot continue."

They say to the negotiators "If you merge, you are going to find yourself in court." Wouldn't this break down most mergers?

Mr. ZAUN. We would have to rely on the Department of Justice on that. It would break down most mergers if the Department of Justice felt the competitive factors had not properly been weighed.

Senator BENNETT. Well, the Department of Justice can pay attention to no other factor than the competitive factor. That is the only thing it has a right to consider. So, even if the other three agencies said that other factors in the merger justified an approval, in spite of the Department of Justice's attitude toward the competitive situation, and they approved it, then in spite of all of their responsibility, this is wiped out in practice because within 30 or 90 days, it doesn't matter which, the Department of Justice says "If you go forward, we will bring suit."

It seems to me in at least 9 cases out of 10, this is a very effective veto.

Mr. HARDING. Mr. Bennett, may I answer that? The point we raise is, first of all, What is the effect of the merger? Is it to concentrate control of banking; is it to diminish competition in banking to a great extent? If it does, you don't want it, do you?

Senator BENNETT. Let's assume we have three responsible regulatory agencies in the banking field, and they have examined all of the factors and presumably they would not have approved a given merger unless they assumed that some other factors or combination of factors outweighed any diminution of competition.

Mr. HARDING. My answer to that, Senator Bennett, is the Department of Justice is far more able to pass upon the competitive factors than any banking department.

Senator BENNETT. That is an interesting comment, because the Department of Justice comes into a situation only after an announcement is made that these banks are considering merging. It would

seem to me the regulatory agencies, with their experience in examining all of the banks involved in the merger, and in examining the banking structure of any given community, over the years would have much more information than a lawyer in the Department of Justice, who didn't know there was a problem until the application had been signed.

Senator PROXMIRE. Will the Senator yield?

Senator BENNETT. Yes.

Senator PROXMIRE. Isn't it true, in the past 3 years there have been something like 763 mergers, and the Department of Justice has actually brought suit 8 times, or 7 times, rather, and in every case they brought suit, they were big banks, well-equipped to fight the suit financially, and therefore very unlikely to be intimidated by the notion that the Department of Justice was going to bring suit?

Senator BENNETT. But now the courts have established that, in effect, the Department of Justice by bringing suit can exercise this veto. It seems to me that many smaller mergers may be slowed down, if not intimidated, by the realization that in the end, it will not be the banking problems that will determine the decision. It will be a decision on the part of the Department of Justice, outside of the bank regulatory agency that in their opinion competition has been substantially lessened.

Mr. Zaun?

Mr. ZAUN. Senator Bennett, I would like to, if I may presume to do so, call your attention to previous testimony that you did not hear. The record shows that since the Bank Merger Act of 1960 was passed, that the record of approvals and disapprovals is in the range of 20 to 1.

Senator BENNETT. Yes, I am aware of that. I am aware of those figures.

Mr. ZAUN. I am reminded of the story of the three monkeys, "hear no evil, see no evil," so I can see in the eyes of the supervisory authorities there almost is not any bad merger. I think that would run contrary to the intent of the committee as expressed on the 1960 bill.

Senator BENNETT. You can't criticize the three regulatory agencies because they have a record of a small number of disapprovals, and then in the same breath say the Department of Justice has only intervened in seven cases out of the many.

It seems to me they are all on the same side of the fence; if you want to criticize one, you have to criticize both.

Mr. ZAUN. The Department of Justice did interpose objection, but brought suit in only seven cases, which would indicate first of all, I suppose, restraint, possibly manpower problems in the Department of Justice——

Senator BENNETT. Or possibly the usual basis for a lawyer's decision, that they couldn't win the case.

Mr. ZAUN. That is very possible.

Senator BENNETT. Sure, so they wouldn't undertake it.

Mr. Harding, I have one more question for you.

I was very interested in your comment that if this bill were passed and the regulatory agency charged with the direct responsibility to pass on a particular merger, because of the type of banks being merged,

that if the banks didn't get a merger on that basis, they would change their status and move over to a more lax or lenient regulatory agency.

Is there any record of the number of banks that have changed their status in the last few years?

Mr. HARDING. Of course, there is a record. I don't have it with me. But I think the supervisory agencies can supply it. And I think you will find that there have been more State banks converting to national banks in the last 12 months than perhaps in the last 12 years.

Senator BENNETT. Do you have any record of what percentage of those banks who have thus changed have subsequently merged as national banks, having been refused merger as State banks before?

Mr. HARDING. Mr. Bennett, I don't want to imply that there was any denial of a merger request. I don't know that. You asked a question of how many had converted, and I believe more have converted in the last 12 months than in a long, long time, to the national system. In other words, there seems to have been an "inducement of laxity" of some kind.

Senator BENNETT. That is an interesting charge to make against the Comptroller, because they can't convert unless he is willing to give them a charter.

Mr. HARDING. That is right.

Senator PROXMIRE. I think the record shows there were 470 applications to the Comptroller General to merge, only 15 were denied, the Federal Reserve Board had something like 141 applications, and 17 denied, so it is obviously about 3 times as easy to get an approval from the Comptroller.

So, by that comparison, it makes sense if you want to merge, the thing to do is convert from State to national, so you have a 3-to-1 break on merging.

Senator BENNETT. Yes. But what is the proportion of the number of banks for which the Federal Reserve has responsibility, compared with the number for which the Comptroller has responsibility? I think the Federal Reserve number is much smaller.

Senator PROXMIRE. I wasn't comparing the approvals. I was comparing the percentage of approvals in relation to the applications. There were three times as many applications for merger with the Comptroller General and proportionately only one-third as many turned down. But there were roughly the same absolute number dropped by the Federal Reserve Board, but the Federal Reserve Board had roughly only one-third as many applications.

Senator BENNETT. But weren't the same number disapproved in both cases?

Senator PROXMIRE. Yes.

Senator BENNETT. But while there were three times as many applications that went to the Comptroller, this must bear some relation to the number of banks he would have the privilege of controlling under this particular law. And if he handles all of the national banks, that must be many times more banks than the Federal Reserve handles.

Here is the figure: The Comptroller has 4,773 banks; the Federal Reserve has 1,452; and FDIC, 7,262.

Senator PROXMIRE. FDIC has the small banks, of course.

Senator BENNETT. Yes. I think this is an interesting idea, but I think you will agree with me, Mr. Harding, that you can't get figures to demonstrate that this process is taking place, that the banks are changing in order to become available for mergers because they have been turned down.

Mr. HARDING. I wouldn't be able to answer that. The agencies could.

Senator PROXMIRE. May I say I think both of you gentlemen made helpful and constructive suggestions to the committee. Now it is hard to tell, the chairman of the subcommittee is also the chairman of the committee, Senator Robertson, and he is also in command of the bill. He is an extremely influential and able Senator, but the fact is, the chairman on the House side has publicly stated he is against the bill, under these circumstances it is possible the compromise you are suggesting might be fruitful. At least it will be subjected to very careful and thoughtful consideration.

Mr. HARDING. Mr. Chairman, may I close with a little incident that happened at this lunchtime?

Some of our group went downtown in a cab, and on the way down we rode with a driver who had a very broad accent, and we discovered he was a Russian, although he had been in this country quite a few years.

We got to chatting, and he asked the question whether we were here visiting Senators, and we explained no, we were up testifying on the merger bill.

"Oh," he says, "I see. Big fish swallow little fish." I think that tells the story better than anything else.

A lot of these mergers basically are nothing more than an effort to be bigger and swallowing little fish in the process.

Mr. Chairman, how long will the record be open for filing?

Senator PROXMIRE. I hate to end these hearings with a fish story.

We have hearings next Wednesday and Thursday, and I presume it will be at least a few days after that. So I would say a minimum of 10 days, and probably longer than that. It will be up to Senator Robertson, the chairman.

Mr. HARDING. Thank you very much for your courtesy in listening.

Senator PROXMIRE. The subcommittee will reconvene Wednesday at 10 o'clock.

(Whereupon, at 4 p.m., the subcommittee recessed, to reconvene at 10 a.m., Wednesday, May 26, 1965.)

(The following letter was ordered to be inserted in the record at this point:)

THE CALUMET NATIONAL BANK OF HAMMOND,
Hammond, Ind., April 30, 1965.

Hon A. WILLIS ROBERTSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR ROBERTSON: May I convey to you the deep interest of the Calumet National Bank of Hammond in the passage of Senate bill 1698. Our interest is emphasized in the brief statement below.

In 1963 the managements of this bank and another local national bank completed a study and survey of the many factors normally presented in a bank merger or consolidation. As a result of our study, we submitted our application for merger. The application was approved by the Comptroller of the Currency. The Justice Department almost immediately instituted litigation to enjoin the consolidation. Each bank had devoted a considerable amount of time and effort and incurred considerable expense in developing the plans for a merger.

The two banks, after giving considerttion to the probable time and expense of defending the authorized merger, decided that neither bank could afford to spend additional time and expense of contesting the Justice Department action, to say nothing of the confusion and uncertainties and possible loss of deposit accounts which might result. Consequently we requested the Comptroller of the Currency to rescind his approval of the merger. This was done.

Closely related to the above, we believe that when a court may require an "unscrambling" of an already existing and seasoned bank merger, much confusion and misunderstanding are likely to result, to say nothing of the possible adverse economic effect upon the bank, as well as the community.

It is our opinion that the Robertson bill, Senate bill 1698, has provided Congress with a very constructive bit of proposed legislation. And, it is our opinion that the passage of this bill will erase the chaos and uncertainties which have developed in recent years relative to bank mergers. We believe it provides the proper regulatory bodies with jurisidiction over bank mergers. And this, in the opinion of the writer, was the intent of Congress in 1960 and other years, as well. It does not, in our opinion, remove the need for the Justice Department's advice and opinion on the competitive factor of a merger. It will not, in our opinion weaken the dual banking system, but rather, we believe it will serve to strengthen it.

We hope you will give Senate bill 1698 your full support.

Sincerely yours,

GEORGE A. GILCHRIST, *President.*

AMEND THE BANK MERGER ACT OF 1960

THURSDAY, MAY 27, 1965

U.S. SENATE,
COMMITTEE ON BANKING AND CURRENCY,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS,
Washington, D.C.

The subcommittee met at 10:07 a.m., in room 5302, New Senate Office Building, Senator A. Willis Robertson (chairman of the subcommittee) presiding.

Present: Senators Robertson, Proxmire, and Bennett.

The CHAIRMAN. The committee will please come to order.

We are pleased to have before us today some very outstanding witnesses, men who are experienced in financial affairs, men who have had an opportunity to observe the practical effects of mergers.

On the basis of that experience and their observations, they are coming here to testify.

We are pleased to have as our first witness the Honorable Charles R. Howell, president, National Association of Supervisors of State Banks, and commissioner of banking and insurance for the State of New Jersey.

I am sure that Mr. Howell knows that when I addressed his association at Williamsburg, I gave them positive assurance of my support for the dual banking system.

I renewed that when I was privileged to address probably the largest group of State bankers—that is in Illinois, because they have no branch banking out there. They had about a thousand present, they told me, at the meeting in Chicago, when I spoke out there last Monday.

I renewed my support of the dual banking system, and I have said that if we preserve State banks, created by State authority, we don't have to worry too much about monopoly in the banking field. Because State banks will always see that the national banks don't preempt the field.

As a matter of fact, they now have about two State banks to one national bank.

National banks, especially in the big cities like New York, Chicago, and San Francisco, are able to gather together a lot of sheckels, and in volume they add up. That doesn't mean they are going to dominate the banking field.

I can assure the State bankers as long as I have anything to do with legislation, I will fight for their place in the sun.

We will be pleased to hear from Mr. Howell at this time.

STATEMENT OF CHARLES R. HOWELL, PRESIDENT, NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS

Mr. Howell. Senator Robertson, Senator Bennett, Senator Proxmire. Mr. Chairman, I certainly appreciate your opening statement, and we do feel that we have a good friend of the dual banking system in the distinguished chairman.

My name is Charles R. Howell. I am commissioner of banking and insurance for the State of New Jersey. Today, I am appearing before this subcommittee as president of the National Association of Supervisors of State Banks.

The association, as you know, is composed of the officials of the State governments responsible for the supervision of the State-chartered banking institutions in every State in the Union, and of such officials in the Commonwealth of Puerto Rico and in the Virgin Islands.

As of June 30, 1964, there were 9,487 commercial and mutual savings banks chartered under State laws subject to the supervisors' jurisdiction with total resources in excess of $200 billion.

My testimony will be short and to the point. The supervisors strongly endorse the bill introduced by the distinguished chairman of the Senate Banking and Currency Committee designed to eliminate the confusion in the bank merger field injected by the recent decisions in the *Philadelphia*, *Lexington*, and *New York* cases and to restore the ultimate approval or disapproval of bank mergers to those agencies with the specialized expertise to pass upon such matters.

When representatives of the NASSB testified before this subcommittee in February of 1959 on S. 1062, the bill which was ultimately enacted by Congress as the Bank Merger Act of 1960, we understood the issue to be a choice between a proposal advanced by the Justice Department to subject banks to section 7 of the Clayton Act, thereby giving the Justice Department final approval over bank mergers, or the proposal embodied in S. 1062 to grant final approval over such mergers to the three Federal bank supervisory authorities.

We favored the latter approach and understood this to have been the intent of Congress in the Bank Merger Act of 1960. Accordingly, we, along with the banking industry, were considerably surprised by the Supreme Court's decision in the *Philadelphia* case.

The effect of the *Philadelphia* decision has been to impose upon bank mergers in which a State bank survives an incredible layer of governmental approvals. Such a merger must first secure the approval of a State bank supervisor under the applicable State law. Then, pursuant to the Bank Merger Act of 1960, it must pass the scrutiny of the Federal Reserve Board, in the case of a State member bank, and of the Federal Deposit Insurance Corporation in the case of a State nonmember bank, and in both cases may only be approved after the receipt of advisory opinions on the competitive factors involved from the other bank regulatory agencies and the Department of Justice.

Finally, the Department of Justice has, in effect, a final approval in the form of a decision whether to institute an action under the Clayton or Sherman Acts.

We do not believe that the Department of Justice, through the Clayton and Sherman Acts, should have anything to do with bank mergers. To continue the Department of Justice in this role would be to give

supreme importance to just one of the many factors which must be considered in bank matters; namely, competition.

In connection with a bank merger, many factors must be considered, including the convenience and need of the community to be served, the financial history and condition of the bank, and the general character of its management. Bank competition is, of course, a factor to be considered—a very important one—but it is not, and should not be made all controlling to the exclusion of banking factors. Furthermore, I very sincerely believe bank supervisory agencies are more knowledgeable and expert in assessing the impact of a merger with respect to its competitive and monopolistic features.

Singling out banks for an exemption from the Clayton and Sherman Acts is not to discriminate in favor of banks as against other business enterprises. It is simply a recognition of the historical fact that banks have never been treated as ordinary business corporations, either by the States or by the Federal Government.

Whereas, as a general principle, competition within the framework of fairplay is the lifeblood of the economy of this country, both the State and the Federal Governments have recognized that certain industries are so charged with the public interest that their success or failure cannot be left entirely to the principles of competitive survival. Banking is in that category.

The failure of a construction firm or a grocery store, while regrettable, does not necessarily damage the economic fiber of the community. The failure of a bank, or, indeed, any damage to the public trust in a bank, could do so because its operations are so inextricably interrelated with a smoothly functioning economy.

That is why both the State and Federal Governments have established agencies with comprehensive regulatory powers over banks. It is utterly inconsistent with this tradition of comprehensive bank regulation to carve out a single banking situation, that of a merger, and place it under the control of another agency with but a single standard of judgment for approval—that of competitive effects.

For all of the foregoing reasons we favor the prompt passage of S. 1698.

Thank you, sir.

The CHAIRMAN. Mr. Howell, your testimony will be very interesting to the members of this committee and to the Congress, because you are recognized as an authority in the field of banking.

You not only have done a fine job in the great State of New Jersey—incidentally, I am on the commission to celebrate your wonderful anniversary date back there before the Revolutionary War as one of the original States——

Mr. HOWELL. Thank you, sir.

The CHAIRMAN (continuing). But you also are now head of the National Association of State supervisors.

I recently had the privilege of addressing a very fine organization in New York. It is the New York Chamber of Commerce, which was chartered in 1768. Now, that is well before the Revolutionary War.

And we had a meeting there in the conference room lined with pictures of very famous men who have been prominent in the financial, professional, and civic activities of our largest city.

While I was in New York, some of the bankers told me about my bill. They said, "We have had over 40 bank mergers in New York City, and competition now is as high as it has ever been among all the banks."

They asked, "Who would be benefited if the Government destroyed all of those mergers, all those 42 mergers that have been made? Who would be benefited?"

They said, "Nobody. But who would be hurt? Not only the stockholders of those banks would be hurt, but a lot of customers would be hurt."

And so you think we should go back to the clear intent of the act of 1960 that these mergers should be approved by the banking agencies.

Now, I think you can assure everybody in New Jersey that if a merger in New Jersey is going to be against the best interests and create a monopoly, you will not approve it. Isn't that true?

Mr. HOWELL. I certainly would feel strongly that way. It would be a very bad thing to create monopolistic conditions.

But I think, as I said in my statement, that perhaps the people who are working closely with banks, supervising them, regulating them, and examining them, can assess the effect of competition on a merger perhaps better than the Department of Justice can.

The CHAIRMAN. And, of course, if you turn a proposed merger down, that is where it dies? Right there?

Mr. HOWELL. It ends there.

The CHAIRMAN. They could not get one then?

Mr. HOWELL. No, they could not.

The CHAIRMAN. As to mergers, I believe in Pennsylvania there have been more mergers than in any State in the Union, and in New York City there have been more than in any city. But it is a big city, and it is the financial center of the Nation and also the world. But there is a bank in San Francisco that is even larger than Chase Manhattan. But that has statewide branching in California, and that bank has branches in every county in the State.

Mr. HOWELL. Yes.

The CHAIRMAN. Well, for reasons that I don't know, the Department of Justice did not attack the merger of Chase Manhattan. For reasons I don't know the Department did not attack the merger of the First National City. But isn't it true that both of those banks are larger than Manufacturers Hanover that they did attack?

Mr. HOWELL. Yes; that is true, Senator.

The CHAIRMAN. Could you see any real justification for Congress or anybody else approving 40-odd mergers, including banks in the same city that are much larger, and destroying Manufacturers Hanover?

Mr. HOWELL. It is very difficult for me to follow the logic of it. In my mind, the creation of another substantial bank such as has been created by Manufacturers Hanover provides more competition for the other large banks that were created earlier. And there are plenty of them still.

The CHAIRMAN. I wish to call attention in the record to this point in my bill: All my bill does is to seek to carry out the declared intention of Congress in my first bill—that was in 1960—that these mergers should be under the exclusive control of the banking agencies, although the Department of Justice would be consulted with respect to any monopoly phase that might be involved in a proposed merger.

Now, that is the reason. When Justice moved in and the Court gave an astounding opinion, one judge said it must have surprised everybody that had anything to do with the bill. Now, that is a member of the Supreme Court who said this decision must have surprised everybody. Naturally, I was surprised, and I think it was wrong, and I think Congress should not take this kind of treatment when the Court ignored what we proposed to do and the policy that we thought should be followed.

The bill was not aimed to help anybody. The bill was not aimed to hurt anybody. The bill was not designed and is not designed to give anybody priority.

All the bill says is that we are going back to 1960 and apply the rule that we intended to be applied. And, therefore, all banks that merged under that rule have clearance, and in the future all banks that merge under the same rule have clearance. That is what it does.

The Senator from Wisconsin.

Senator PROXMIRE. Mr. Howell, you express surprise at the action taken in the *Philadelphia* case, and yet is it not a fact that in the *Philadelphia* case the Comptroller was alone—Let me put it this way: The Federal Reserve and the FDIC, as well as the Attorney General, advised that the proposed merger would have a substantial anticompetitive effect in the Philadelphia metropolitan area.

Mr. HOWELL. Well, my recollection, Senator, is—and I may be mixing it with the wrong case—that the Federal Reserve Board was divided to some extent on it and that the FDIC took a somewhat neutral position.

I may be wrong, but that is my recollection.

Senator PROXMIRE. At any rate, the *Philadelphia* decision, which I have before me, reads on page 10 as follows. This was the Brennan statement. As far as I know it wasn't challenged.

> Such consolidation was authorized subject to the approval of the Comptroller of the Currency. The Comptroller may not give his approval until he has received reports from the other two banking agencies and the Attorney General respecting the probable effect of the proposed transaction on competition.
>
> All three reports advised that the proposed merger would have substantial anticompetitive effects in the Philadelphia metropolitan area.

Mr. HOWELL. That seems clear.

Senator PROXMIRE. Now, you say on page 3 of your statement:

> We do not believe that the Department of Justice, through the Clayton and Sherman Acts, should have anything to do with bank mergers.

That goes further than the Robertson bill of 1960, which, as I understand, provided the Department of Justice would at least have an advisory recommendation to the agency that had jurisdiction. It wouldn't have any final say, as we interpreted the proposal, but would have a right to make an advisory finding.

Mr. HOWELL. I think it is desirable for Justice to file an advisory opinion. I think it can be helpful to the other banking agencies in assessing the competitive and monopolistic impact of it.

So I am not suggesting the elimination of that, because I think that can be of some value.

But I do think in the final analysis that either the State bank supervisor or the Federal Reserve people or the FDIC, who are pretty familiar with the operation of the banks in their spheres of jurisdic-

tion, can really figure what that competitive impact is going to be much better than perhaps Justice just looking at something getting larger or one competitor being taken out of the banking community.

Senator PROXMIRE. I think you put your finger on what is the crux of this whole discussion—the area of competence.

And, frankly, I am not persuaded either way as yet. I think you can make a strong case both ways. You argue that these banking agencies' whole attention, their whole competence is in the area of banking. This is what they know and understand. The Department of Justice obviously has many other responsibilities.

On the other hand, it can be argued that the Department of Justice, at least their Antitrust Division, has exclusive concern with competition and enforcing the antitrust laws, and this is their area of competence.

So, in a sense, it is a standoff. It is hard to resolve.

Perhaps the provisions in the 1960 Robertson bill are a compromise, putting the Department of Justice in an advisory position.

On the other hand, you see our reluctance is that we look at the situation in the big cities all around the country, and we find one bank usually has a large proportion of the banking assets and that three or four banks have an overwhelming majority of the banking assets.

Mr. HOWELL. In some instances that is true.

Senator PROXMIRE. And yet mergers are being approved constantly.

Mr. HOWELL. But when you look at a case like New York, with the large number of really big banks, it is very difficult for me to see how the Manufacturers Hanover, which would throw one more strong competitor to compete with these big boys, so to speak, could have an adverse competitive effect on the situation.

And I think Mr. Wille, of New York, or the people in the Comptroller's office or the Fed or the FDIC can assess those things and assess them more clearly than Justice can.

And I am glad we have an Antitrust Division there. I think in many respects they do a needed public job. But I think they have a little tendency to oversimplify the competitive effects and don't understand it perhaps as well as people who are working with banks and banking every day.

Senator PROXMIRE. Let me ask you this: Do you have any view on whether or not any action that would be taken by this committee would do what I think is perhaps most important? And that is to provide that those banks that are already merged, that already have been scrambled, would not have to undergo the agony and the inequity and the financial loss, disruption of the economy in the community, of being required now to unscramble.

You see, the independent bankers who were opposed to this bill nevertheless proposed that the banks that are now merged be permitted to remain as they are and that any inhibition by the Department of Justice be on future proposals.

Mr. HOWELL. That would be——

Senator PROXMIRE. Is that practically possible, legally, do you think? Can Congress legally act to permit this?

Mr. HOWELL. Well, I am not trained in the law, though I served in a lawmaking capacity in the State and in the U.S. Government, but I think I would prefer to leave that to someone more talented in constitutional law.

Senator PROXMIRE. As a banker, would you agree this would be desirable?

Mr. HOWELL. Oh, I think it would be very desirable, Senator, but I do not think that that in itself is the answer to the whole problem.

Senator PROXMIRE. They added one other thing. That is, they would limit the Department of Justice in the time it would have to file suit.

Mr. HOWELL. That would——

Senator PROXMIRE. Instead of many months, they might be limited to 30 days.

Mr. HOWELL. That would be helpful, but that would not do the entire job I feel needs to be done.

Senator PROXMIRE. Thank you.

The CHAIRMAN. The Chair will agree that a bill that would give a clearance to past mergers and limit the Department of Justice to a limited time on future mergers would be better than no bill at all.

But here is one vital issue that we raised in 1960, and it is still before us: What tests shall be applied to a merger? This is fundamental. It is very vital. And that is what the Commissioner has been testifying about.

Are bank mergers to be approved or denied on the basis of competitive factors alone—on the basis of their effect on "any line of commerce in any section of the country"? Or are they to be considered on the basis of the public interest, on the basis of the overall competitive situation. including local and regional and national and international competition, and including competition from other institutions such as savings and loans and savings banks and insurance companies and mortgage bankers and investment bankers and investment companies, and on the basis of the needs of the community—of depositors, large and small, and personal and business borrowers and other users of bank services?

Here is what we said in our report:

Judge Weinfeld stated his understanding of the effect of the statute as follows—

now, this is the Clayton Act—

"If the merger offends the statute in any relevant market, then good motives and even demonstrable benefits are irrelevant and afford no defense. The antitrust laws articulate the policy formulated by Congress. The significance and objectives of the Clayton Act and the 1950 amendments are well documented. In approving the policy embodied in these acts, Congress rejected the alleged advantages of size in favor of the preservation of the competitive system.

"The consideration to be accorded the benefits of one kind or another in one section or another of the country which may flow from a merger involving a substantial lessening of competition is a matter properly to be urged upon Congress. It is outside the province of the court.

"The simple test under section 7 is whether or not the merger may substantially lessen competition in any line of commerce in any section of the country."

Now, with all due deference to the distinguished judge in New York in the *Manufacturers Hanover* case, he wrote hundreds of words and I don't know how many pages, but he wound up with this conclusion:

We had two banks. Now we only have one. If you have one when you had two, you have lessened competition. If you lessen competition, you have violated the antitrust law. You are a criminal and we will destroy you.

I am paraphrasing, but it seems to me this is the effect of what he said.

Now, here's what we said in our report in 1960:

The committee concluded, on the other hand, that imposing the strict rule of section 7 of the Clayton Act as amended in 1950, as interpreted in the *Bethlehem* case—

that is the one I quoted just now—

would give absolute and controlling weight to the lessening of competition regardless of other factors.

The committee did not consider that it would be in the public interest to regulate bank mergers under standards which would mean that the demonstrable benefits of a merger are irrelevant and outside the province of the administration and which would make no distinction between good mergers and bad mergers.

The Senator from Utah.

Senator BENNETT. I have enjoyed this discussion, and I appreciate the testimony. I have no questions.

The CHAIRMAN. We thank you very much.

Mr. HOWELL. Thank you, gentlemen.

The CHAIRMAN. The next witness is another man experienced in the financial field who supervises more money than any one State supervisor in the United States. And I am glad to say he has had a chance to look at mergers—as I say, 40 of them in 1 city. He also has a good-sized bank holding company up there that operates in a good many cities. Commercial banks compete. Mutual savings banks compete. Savings and loans compete. He supervises them all and he knows how they operate and how they compete.

We are pleased to have the superintendent of banks of the great State of New York, Hon. Frank Wille.

STATEMENT OF FRANK J. WILLE, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK

Mr. WILLE. Good morning, Senator.

The CHAIRMAN. Good morning, Mr. Wille. You may proceed.

Mr. WILLE. Thank you, sir.

My name is Frank Wille. I am superintendent of banks of the State of New York.

With your permission, gentlemen, I would like first to read a brief statement as to my views on the bill which is before you, and then, of course, I would be glad to answer any questions that you might have in which you think I might be helpful to you.

The CHAIRMAN. You may proceed without interruption.

Mr. WILLE. This committee has before it for consideration S. 1698, a bill introduced by your distinguished chairman, which would place in the bank supervisory agencies exclusive authority to approve bank mergers and similar acquisitions. The bill would exempt past bank mergers as well as future bank mergers from possible attack under the Federal antitrust laws.

I deeply appreciate your invitation to express my views on this important proposal. Briefly stated they are these:

I support the basic purpose of the bill which is to assign exclusive authority over bank mergers to the bank supervisory agencies.

I must recommend, however, that no antitrust exemption be enacted for future bank mergers unless at the same time a uniform review procedure is established for all proposed mergers, irrespective of whether the resulting bank is a State bank or a national bank.

My reasons for each of these conclusions, and the amendment to the bill which I would propose, are as follows:

First, as to the assignment of exclusive jurisdiction to the bank supervisory agencies:

The passage of the Bank Merger Act in 1960 followed 5 years of mounting concern in Congress with the large number of bank mergers which had taken place throughout the country during the 1950's. The evident purpose of the act was to subject proposed bank mergers to the review of at least one Federal bank agency and to require specifically that such agency consider, among other factors, the competitive effects of a proposed merger.

The act required the consideration of seven specific factors and clearly contemplated a balanced judgment in which no one factor would necessarily be controlling. Most observers thus believed that a bank merger would not be judged on competitive factors alone.

A similar change was made in New York State in 1960, when the merger provisions of our banking law were amended to require the superintendent of banks and the banking board to consider, in determining whether to approve a proposed merger, not only the banking factors, but also the following:

1. Whether the merger would expand the size or extent of the resulting institution beyond limits consistent with adequate and sound banking and the preservation thereof.

2. Whether the merger would result in a concentration of assets beyond limits consistent with effective competition.

3. Whether the merger might result in such a lessening of competition as to be injurious to the interests of the public or tend toward monopoly, and finally and primarily, the public interest and the needs and convenience thereof.

The pros and cons of assigning exclusive authority over bank mergers to the bank supervisory agencies have been developed at length before this committee both in 1959 and 1960 and in connection with the present bill. From the vantage point of the New York State Banking Department, I see no reason to question the wisdom of the decision which most observers thought Congress had made in 1960.

An examination of the merger decisions since 1960 involving State-chartered banks in New York State under the Bank Merger Act and the New York banking law makes it apparent that the New York authorities, and the Federal supervisory agencies which review our decisions, have strictly observed the statutory mandate that they weigh the competitive impact of a proposed merger along with the banking factors.

Since May 1, 1960, the New York State Banking Department has processed 57 applications involving mergers or acquisitions of commercial and savings banks. Each has been subjected to a careful and intensive analysis of the probable impact of the merger upon existing and potential competition. Of these 57 applications, nine have been disapproved in the first instance by the New York Superintendent of Banks or the New York Banking Board, and six more have been dis-

approved by the appropriate Federal agency—in all cases because the anticompetitive effects of the proposed merger were thought to outweigh the claimed benefits to the public.

Thus, the overall results of administrative review—at least as to the merger applications with which the New York State Banking Department is familiar—appear to vindicate the judgment of Congress that the bank supervisory agencies, under appropriate statutory direction, can be relied upon to consider fully the competitive aspects of a bank merger and then reach a balanced judgment based on all the factors.

In New York State, the result has been a bank structure in which vigorous competition is the rule, not the exception. In the New York City metropolitan area, for example, some 50 commercial banks of varying size offer a very broad range of bank services and seek bank business from all types of customers. An additional 20 other commercial banks carry on a more specialized business, seeking predominantly corporate, trust, or international business. Each of these banks is also subject to vigorous competition from other types of financial institutions in most lines of their bank business.

Under these circumstances, I see no public benefit in subjecting to antitrust attack past bank mergers in New York State which were consummated with the approval of the bank supervisory agencies.

Other witnesses have discussed the difficult problems which must be overcome if divestiture is required years after a bank has merged. Among the most troublesome of these I would mention are the disposition of postmerger loans which exceed the lending limits of either constituent bank, the division of postmerger accounts, offices, and electronic data-processing equipment, and the maintenance by each new bank of a sound balance between the deposits and loans which are assigned to it upon divestiture.

In addition to the long period of uncertainty and confusion which would attend a divestiture proceeding against a New York bank like Manufacturers Hanover Trust Co., I question whether the end result will serve the public interest.

Each of the six largest New York City banks, and several of our upstate banks, have had one or more significant mergers since section 7 of the Clayton Act was amended in 1950. Many of these mergers were essential if the bank credit needs of our large and growing industrial corporations were to be met conveniently and at the lowest possible cost. Many of these mergers, including the Manufacturers Hanover merger, have resulted in more effective competition for larger banks.

Finally, I question whether past mergers consummated under a different understanding of the Clayton Act and of the Sherman Act should now be subject to divestiture as a result of new interpretations by the U.S. Supreme Court. Fairness and equity would seem to dictate a specific antitrust exemption for these mergers.

For all of these reasons, I support as I have said the assignment of exclusive authority over bank mergers to the bank supervisory agencies.

This brings me to my second point, which concerns a uniform review of future bank mergers.

Before Congress enacts an antitrust exemption for future bank mergers, it should recognize that the Department of Justice today is

the only agency of Government applying the same standards of review to the mergers of both National and State banks.

In my judgment, the enactment of the bill before you, without the enactment at the same time of a uniform review procedure for all bank meregers, is bound to result in the unequal treatment of competing banks depending on whether the proposed merger results in a national bank, a State member bank or a nonmember insured bank.

I am referring, of course, to the differing procedures established by the Bank Merger Act under which merger applications which would result in a national bank need be approved only by the Comptroller of the Currency while merger applications which would result in a State bank must be approved in the first instance by the appropriate State authority and then by the Board of Governors of the Federal Reserve System in the case of member banks, or by the Federal Deposit Insurance Corporation in the case of nonmember insured banks.

Congress recognized I think in 1960 that these review procedures would work equitably and fairly only if the three Federal bank agencies reviewed the competitive factors of a proposed merger with some degree of uniformity. To help achieve this uniformity, the Bank Merger Act called for advisory reports on the competitive factors, not merely from the Department of Justice, but also from the two bank agencies which were not directly responsible for the merger decision.

In practice, however, the three Federal bank agencies appear to have taken substantially different views of the competitive factors.

In testimony before a House subcommittee on May 10, 1963, my immediate predecessor as superintendent, Mr. Oren Root, pointed out several instances involving New York banks where it appeared that the Federal Reserve Board and the Comptroller of the Currency were taking quite different views of the increasing bank concentration in certain areas of New York State. Additional instances could be cited today.

The Comptroller of the Currency has made much the same point in his decision of September 30, 1963, approving the merger of the Citizens National Bank of Los Angeles and the Crocker-Anglo National Bank of San Francisco. He said at that time and I quote:

> The aim of the Bank Merger Act to achieve uniformity through advisory reports on the competitive aspects of bank mergers has obviously failed.
>
> The need for uniformity of approach among the agencies concerned with bank mergers—

Mr. Saxon said—

> is demonstrated by many manifest inconsistencies in recent year * * *. (Comptroller of the Currency 101st annual report, 1963, p. 186.)

The merits of the differing view of the bank agencies on the competitive factors are less important, it seems to me than the fact that the differences exist, because it means that competing banks are not being treated the same with resepect to their merger applications. This lack of uniformity is inherent in the system of review etsablished by the Bank Merger Act, and its solution would appear to require the designation of one Federal bank agency which would review merger approvals not only of the State banking authorities but of the Comptroller of the Currency as well.

This designation need not await a general reorganization of the basic structure of Federal bank supervision. All national banks are insured member banks. Thus, the common Federal reviewing agency could be either the Board of Governors of the Federal Reserve System or the Federal Deposit Insurance Corporation. My own preference would be the Federal Reserve Board. With seven members of the Board it would seem to have clear advantages over a board of three members, particularly where one of the three members of the Federal Deposit Insurance Corporation (i.e., the Comptroller of the Currency) must pass upon national bank mergers in the first instance.

If the Federal Reserve Board is so designated, the present powers of the Federal Deposit Insurance Corporation over mergers of insured nonmember banks ideally should be transferred to the Federal Reserve Board at the same time. Conversely, if the Federal Deposit Insurance Corporation is so designated, the present powers of the Federal Reserve Board to review mergers of insured State member banks should be transferred ideally to the Federal Deposit Insurance Corporation.

Either way, the establishment of one Federal supervisory agency to review all bank mergers initially approved by the State authorities and the Comptroller of Currency would go far toward assuring fairness and equity among competing banks and would help preserve some semblance of competitive balance between the powers of State banks and the powers of National banks in this critical area.

The ability to grow by merger is so basic to a bank's competitive position that a lack of uniformity in the standards applied to bank mergers could well in my judgment endanger the dual banking system itself.

In closing, Mr. Chairman, I would restate my basic position on the bill before you.

I support the basic purpose of the bill, which is to assign exclusive authority over bank mergers to the bank supervisory agencies.

I recommend, however, that no antitrust exemption be enacted for future bank mergers unless at the same time a uniform review procedure is established for all proposed mergers, irrespective of whether the resulting bank is a State or a National bank.

Gentlemen, I thank you for your patience.

The Chairman. Mr. Wille, I want to thank you for a thoughtful, a very helpful statement on the problems involved.

You, of course, are familiar with the old English maxim that the proof of the pudding is chewing of the bag.

You know from time immemorial the favorite dessert at Christmas of the British was the plum pudding. The ladies of the Episcopal Church in my hometown bake it at Christmas for sale, and I like it, and I buy it. They put it up in tin cans, but I think the British used to cook the plum pudding in a bag, and if you chewed down on that bag after the pudding came out, you knew the pudding had been in there.

Well, I feel your testimony is in line with that old maxim—that the best proof of a fact is a man who has lived with it.

The best proof that banking agencies should control bank mergers is what has happened in your great State of New York.

You had 50-some applications. You turned down those that you didn't think were proper. You approved 43 of them, I believe, wasn't it?

Mr. WILLE. It would have been 42, sir, very close.

Senator BENNETT. He disapproved nine and the Federal Reserve Board or the FDIC disapproved six more.

The CHAIRMAN. I was pretty close.

Mr. WILLE. Yes, sir.

The CHAIRMAN. Now, six of the largest have merged. That is what you said; didn't you?

Mr. WILLE. I want to just point out, sir, that the 15 that were refused and the 57 applications that I mentioned in my statement have occurred since the Bank Merger Act was passed in 1960. Some of these other larger mergers took place prior to the passage of the Bank Merger Act.

The CHAIRMAN. But you have a law in New York that requires a banking agency to consider the competitive factors?

Mr. WILLE. Yes, sir.

The CHAIRMAN. All right. And when you turn down a proposed merger of a State bank, that ends it?

Mr. WILLE. Yes.

The CHAIRMAN. The Chase used to be the Chase National. It became a State bank, and then it was merged with another State bank and had the approval of the State banking authorities.

Mr. WILLE. That is correct, sir.

The CHAIRMAN. And then it had the approval, being a member bank, of the Federal Reserve Board?

Mr. WILLE. The Chase Manhattan merger was approved in 1955. I am not certain if the approval of the Federal Reserve Board was required at that time. If it was, of course, they had it, sir.

The CHAIRMAN. And the Chase Manhattan is larger than the Manufacturers Hanover?

Mr. WILLE. Yes, sir.

The CHAIRMAN. Then we had two national banks that merged; the First National and the National City. That is larger than the Manufacturers?

Mr. WILLE. Yes, sir. By a substantial amount.

The CHAIRMAN. The State banking authorities did not have control, but it was approved by the Comptroller. That was not attacked by the Department of Justice.

Mr. WILLE. That is correct, sir.

The CHAIRMAN. Then we had two State banks; one called Manufacturers, one called Hanover. They got the approval of the State banking authorities.

Mr. WILLE. That is correct.

The CHAIRMAN. And then they were approved by the Federal Reserve Board.

Mr. WILLE. Yes.

The CHAIRMAN. But that merger was attacked.

Your position is that the mergers that have been effectuated in New York and elsewhere should now be approved——

Mr. WILLE. Yes, sir; that is correct.

The CHAIRMAN. But you think that before we give final approval to future mergers there should be a waiting period during which time the Department of Justice, if it so elects, could go into court and bring a suit and then they merge at their peril?

Mr. WILLE. No, sir. I would like to correct that interpretation. Actually, that is the suggestion of Chairman Martin of the Federal Reserve Board.

The CHAIRMAN. Oh.

Mr. WILLE. My own suggestion is that the context and the purpose of the Bank Merger Act of 1960, with advisory opinions from the Department of Justice, be carried out in any future bank merger.

The CHAIRMAN. Oh.

Mr. WILLE. However, as I said, I would like to see and believe it important that all bank mergers be approved by one Federal agency so that there is some uniformity of result between National- and State-chartered banks.

The CHAIRMAN. I see.

Mr. WILLE. My own proposal would not authorize the Department of Justice subsequent to approval by the bank supervisory agencies to bring an independent action on antitrust grounds.

The CHAIRMAN. I am glad to get that clarified. I thought you were endorsing the position by Mr. Brumbaugh, of Pennsylvania, the first speaker for the independents, to have in future mergers a review period and an opportunity for action by the Department of Justice. But you just want uniformity with an opportunity for the Department of Justice to express its opinion?

Mr. WILLE. That is correct, sir.

The CHAIRMAN. But final action would be taken by the regulatory agencies?

Mr. WILLE. Absolutely, sir. I would point out that the two are alternatives to the treatment of future bank mergers contained in the present bill which you have introduced. I think that either would be preferable to an exemption from the antitrust laws as to the future bank mergers without a uniform review procedure.

The CHAIRMAN. The Senator from Wisconsin.

Senator PROXMIRE. On page 2 of the bill, lines 9 to 16, section 2, provide:

> No proceedings shall hereafter be instituted or prosecuted under the antitrust laws, including the Sherman Antitrust Act and the Clayton Act, against any bank insured under the Federal Deposit Insurance Act by reason of or with respect to any merger, consolidation or acquisition of stock or assets and assumption of liabilities consummated before May 13, 1960 * * *.

I take it you not only support this section but you find no constitutional problem involved here?

Mr. WILLE. I would prefer not to express a judgment on the constitutional point, Senator. I do support the position taken in section 2 of the bill. I think it would be unfortunate if one bank such as Manufacturers Hanover Trust Co., which is the third largest bank in New York City, were to be subject to divestiture action, while the mergers of some of the larger banks were not. I may be just a step ahead here, actually. I think that the exemption for past bank mergers is very much in order in view of the changed circumstances resulting from the Supreme Court's decision.

You had earlier asked Mr. Howell, I believe, whether or not it would be a good idea to pass a bill which would exempt past bank mergers but perhaps have a different procedure or continue to have the Department of Justice able to bring an antitrust action on future bank mergers. My own feeling on that proposal would be that you could tend to freeze the present competitive structure in a particular community.

I believe that if you divest a bank, like Manufacturers Hanover, but exempt under section 2 of this bill past mergers prior to 1960, that, in fact, you create a new competitive structure, and I don't think that you do equity at the same time.

Senator PROXMIRE. If the law provided the Justice Department can stop mergers in the future, I would agree with you. But as I understand it, at the most the law gives the Department of Justice simply discretion to bring suit. They have only brought suit 7 or 8 times——

Mr. WILLE. Yes, sir.

Senator PROXMIRE (continuing). In those rare cases where they think there is such a clear destruction of competition that such action is necessary. But most mergers would be able to proceed as they have proceeded since the *Philadelphia* case.

Mr. WILLE. Unless there is a change of policy in the Department of Justice; yes, sir.

Senator PROXMIRE. Yes. Well, let me ask you this: The independent bankers also proposed this kind of a compromise: That if two of three—and this would be getting to uniformity, which I think is very constructive, if two of the three regulatory banking agencies disapproved, then the merger would be out.

You see, in other words, in every case the three agencies have to come to some kind of a decision on the competitive factors at least. They propose that they come to an overall decision and, if two of the three veto it, then it is out. If one of the three opposes the merger, then they propose hearings. If all three approve, then presumably the merger would go through.

What do you think of that kind of a proposal? It gets at the uniformity in a little different way. It forces them to consider the views of each other. And the hearing process would enable them to work gradually toward uniformity, although you cannot get the perfect uniformity you propose here unless you do as you suggest—just give one agency the decision in all cases.

Mr. WILLE. I would think that, that in my judgment would be the deficiency of the proposal that you have just mentioned—that although you do have public hearings, in the event of a disagreement among the bank agencies as to the competitive factors, still there is only one of the three possible people or boards who are required to make the final decision, and it seems to me that you have no assurance whatever of actual uniformity in result.

And I think that you may find yourself in a situation which we have had I believe since 1960 and which I think that the Comptroller would agree we have had since 1960.

Senator PROXMIRE. You do not see any particular merit, then, in the argument that you could maintain the three agencies and have a decision by two of them prohibiting the merger be decisive? You still——

Mr. WILLE. I am sorry. I did not focus on that particular point of their proposal, sir. If two of the three decided adversely on the competitive factors, then the merger would be disapproved?

Senator PROXMIRE. Yes.

Mr. WILLE. I think in a way that that would defeat what I understood was the purpose of the Congress in seeking a balanced judgment between the competitive and the banking factors. And if, in fact, two of the Federal bank agencies who disagree on the competitive factors alone are able to veto a particular merger proposal, I do not think that you are achieving that balanced judgment that I believe should reside in the bank agency making the final decision.

Senator PROXMIRE. On page 4 you discuss the 57 applications received in the New York State Banking Department since 1960.

Mr. WILLE. Yes, sir.

Senator PROXMIRE. And you say nine were disapproved in the first instance by the superintendent of banks. Six more were disapproved by the appropriate Federal agency. Were any of these disapprovals in New York City?

Mr. WILLE. Yes, sir; there was one disapproval relating to the Bowery Manhattan Savings Bank. I disapproved that merger last fall. I believe there may have been as many as six other mergers in New York City of smaller banks.

Senator PROXMIRE. That were disapproved?

Mr. WILLE. No; that were approved. So there would be——

Senator PROXMIRE. Just one disapproved?

Mr. WILLE. It was just the one that has been disapproved of the seven.

Senator PROXMIRE. That is a little puzzling, because I think the chairman has made a very strong case this morning about the Manufacturers Hanover merger being of two banks that are smaller, and smaller in aggregate, than two other banks in the city. And the Bowery must be a great deal smaller than the Manufacturers Hanover. Yet that was disapproved by your agency.

Mr. WILLE. The Bowery Savings Bank, sir, is our largest savings bank in New York City. It has assets approaching $2 billion. And the Manhattan Savings Bank was also one of our larger savings banks, actually, with assets of approximately $550 million. There was a firm——

Senator PROXMIRE. You felt that the competition as far as savings were concerned would be sharply reduced?

Mr. WILLE. Yes, sir. I disapproved the application on the basis of the increase in concentration in particular areas of New York City, specifically the borough of Manhattan, where most of their offices were, and also in two specific neighborhoods within Manhattan.

Senator PROXMIRE. I just have one more question. You, I think, bring a fresh and a very helpful note here when you point out that the Department of Justice today is the only agency applying the same standards with a view to merger of National and State banks. This seems in your view to be a constructive and useful function to the Department of Justice. You have a remedy that would be different, but presumably this is a useful function at the present time.

And rather than simply proceed and have disparate review, which puts the banks in an unfortunate competitive position depending on

which agency is the stricter, it would seem to me that the Department of Justice action under the present operations of the law is probably an improvement over what we would have if we took the Department of Justice out and left this disparate resolution.

Mr. WILLE. As I said earlier, Senator, there are two alternative proposals that have been suggested. One is Chairman Martin's approach, and one is the one that I have suggested. I have a preference for mine, of course. But I think that his is preferable to the enactment of the bill before you without some sort of uniform review procedure.

I would prefer to see the Department of Justice kept in this role than to see a complete antitrust exemption, for future bank mergers where there would be no agency of Government performing this common review function.

Senator PROXMIRE. The common review function you think is fundamental? It is not enough simply to have one of the three regulatory agencies govern their own in their own areas as we have now? You would want a common review either by the Department of Justice or one of these regulatory agencies, but you prefer to have one of these regulatory agencies, either the Federal Reserve Board or the FDIC, to act in all cases——

Mr. WILLE. That is correct, sir.

Senator PROXMIRE (continuing). To have the final say in all cases?

Mr. WILLE. Yes, sir.

Senator PROXMIRE. Thank you.

Senator BENNETT. Mr. Chairman, may I just raise one question?

The CHAIRMAN. Yes, sir.

Senator BENNETT. I would not want the record to show that the present bill takes the Department of Justice out completely. It leaves it as an adviser. But we are now facing the practical fact that under the interpretation of the Court, the Department of Justice has the ultimate decision. And all the decisions of the bank regulatory agencies may go down the drain if the Department of Justice disagrees with it.

So we are facing the problem of how to use the values the Department of Justice can contribute without giving it a final veto. Isn't that the problem we are facing?

Mr. WILLE. That I believe is the basic problem, sir, and I think that, unlike Chairman Martin's position, which would retain for the Department of Justice this veto, if you like, mine would retain them in the advisory role for which the Congress intended them in 1960.

Senator BENNETT. Under yours, you put the Comptroller for National banks in roughly the same position you hold for the State banks.

Mr. WILLE. That is correct, sir.

Senator BENNETT. And then set another bank regulatory agency above the two of you for final choice. This is an interesting approach. I am not sure whether it should proceed that way, if we are to have a final authority, or whether we should work to the development of more uniform standards, still leaving each authority with the responsibility for that segment of the banking industry for which it now has responsibility.

When you shift the responsibility to one agency, you are taking a rather significant step toward a day when we would be persuaded to unite all Federal agencies and create one superagency to handle all Federal bank problems. Have you considered the threat of that?

Mr. WILLE. I want to make it clear, sir, that I am not advocating by any means such a single Federal agency with all of the functions that thre three different agencies now have over bank supervision. My own suggestion is limited to the specific problem of merger approvals.

Senator BENNETT. Yes, I understand that. But it is one step in the direction of concentration of Federal regulatory power.

Mr. WILLE. It is a step which I think is rational and will be needed if the bill before you is enacted in its present form.

Senator BENNETT. You do not think it could be solved by the adoption of uniform standards on the basis of which all of the agencies must make their decision?

Mr. WILLE. No, sir. I really don't. I think that reasonable men differ on their views as to the competitive factors. And I think this is understandable and to be expected.

I would feel a considerable degree of comfort, if you like, if the merger decisions involving national banks were to be decided by a board. But they are not. They are decided by one man. I don't intend to get into any personalities of any sort, but I think so long as you have one person deciding the merger applications of national banks whereas you have at least four, the State authority and the Federal Deposit Insurance Corporation, and possibly eight deciding the merger approvals of State-chartered banks, you have inherent in that structure an imbalance between the two systems, assuming that there is a difference of opinion as to how you should view the competitive factors.

And I think that there has been such a difference of opinion since 1960.

Senator BENNETT. I would like to go back for just 1 minute to the suggestion referred to by the Senator from Wisconsin that if two of the three agencies disapprove that this is an automatic denial, and that if one of the three disapproves you have to have a hearing.

Let's start with the first one first. Is it a good practice in handling problems as delicate as bank merger negotiations to require a public hearing?

Mr. WILLE. I was not certain from the Senator's question earlier as to what scope the public hearing would have. From my experience most of the competitive factors that would be involved in a bank merger are matters of public record in any event. The matters that are confidential and which you would not want to have discussed in a public hearing would be primarily the banking factors.

Senator BENNETT. Well, can you base a decision on a public hearing if you are only going to discuss at the hearing the competitive factors which may be of only minor importance?

Mr. WILLE. In my judgment; no, sir. I would prefer, as I think this committee and the Congress preferred, a balanced judgment in which the competitive factors would be one of the factors to be considered but not necessarily the controlling one.

Senator PROXMIRE. If the Senator would yield——

Senator BENNETT. Yes.

Senator PROXMIRE (continuing). I am not sure that the independent bankers proposed it be a public hearing. Possibly it should be an executive hearing in this case in view of the fact that there would be banking factors that should not be disclosed.

Senator BENNETT. Well, I am just raising the point. I think it is very dangerous to have a public hearing involving problems of a bank merger.

The CHAIRMAN. I can illustrate that by a case that recently happened in the great Commonwealth of Virginia. The Comptroller chartered two little national banks right close together. One or two of the banks in the latter community protested very bitterly against one of those banks and said there wasn't any place for it. Within a year that bank was broke.

So what did they do? They moved in very quietly and merged it. And nobody ever heard that it was almost broke, and now they can go ahead and do business.

Now, if they had had a public hearing, it would not have been any use to merge it. Everybody would have said, "Let me have my money now. I'm through."

We have a number of instances in which the FDIC has worked out a quiet merger, saving the Government's and everyone else's money. Nobody knows; it just merged and that's all there is to it.

So that is one illustration where you would not want a public hearing. If you do, you defeat the whole thing.

Senator BENNETT. Even if the hearing is private, it must be public knowledge that a hearing is going to be held; otherwise, you don't have any hearing and, it seems to me, that this could be dangerous in a banking situation.

The other problem that bothers me a little is that here are three Federal regulatory agencies and, if you accept the concept that if two of the three oppose a merger it is automatically dead, you set up a situation in which the agency charged with the responsibility may have decided in the affirmative and the two other agencies decided in the negative, so you have taken the authority away from the agency to which it is given by law.

These nice mechanical methods of handling problems do not always turn out to be the wisest methods of handling them.

As you have testified, my mind has been playing around with the idea maybe there should be some kind of a legally constituted committee in which representatives of these two should be present rather than to shift part of the jurisdiction with respect to one group of banks over to another Federal agency that under the present law has no jurisdiction. Maybe there should be a merger tribunal set up at which the Federal Reserve and the FDIC are represented, if it is necessary to come to one final body for decision, rather than to say, "We're going to transfer part of the responsibility over certain banks away from the agency that now has it into another agency."

Mr. WILLE. Well, of course, the Federal Reserve Board and the FDIC both today have powers with respect to national banks. It is not a complete separation, as you know, on other matters.

Senator BENNETT. That is right. I have no further comments.

Senator PROXMIRE. Could I just ask, Mr. Chairman, one question?

The CHAIRMAN. Yes.

Senator PROXMIRE. I had a vague recollection that when Chairman Martin appeared before this committee he did mention as kind of an afterthought, while he supported the Robertson bill, that we might consider the possibility of permitting the Department of Justice to

take action without a limited period of time. But, (*a*) that was an afterthought, and (*b*) that wasn't the main thrust.

And it seems to me that this wasn't his principal preference. Maybe I misinterpreted the Chairman of the Federal Reserve Board. It was my understanding he supported your bill without qualification but said, if the Congress decided that it would not accept it, this was another compromise. Wasn't that correct?

The CHAIRMAN. That was a recommendation of lower magnitude, yes; he preferred my bill.

Senator PROXMIRE. He preferred your bill?

The CHAIRMAN. Yes.

Senator PROXMIRE. I am inclined to prefer possibly the second, the lower magnitude recommendation. But I just wanted to get it clear for the record.

The CHAIRMAN. Well, as to the constitutional issue, of course, I am sure my colleagues remember we once had a great jurist from Virginia named John Marshall. He was a Federalist and a strong Union man. And then we had from Tennesssee a very determined President named Andrew Jackson, who was a Democrat.

Incidentally, he was the first Democrat for whom Virginia ever voted. Did you know that?

Senator PROXMIRE. I didn't know that.

The CHAIRMAN. That's right. And Georgia had some of these missionaries like they recently have had in Alabama. They came down to stir up trouble among the Cherokee Indians. So Georgia passed a law that any white man that got into the Cherokee Reservation to stir up trouble for the State among the Indians had to take an oath of allegiance to Georgia.

John Marshall ruled that the Indians were on a reservation and Georgia couldn't pass a law of that kind.

Well, that made Andrew Jackson pretty sore. He said, "Marshall has made his decision. Let's see him enforce it."

Well, they finally settled it. Georgia backed down part of the way. The white missionaries who were going to raise all the trouble down there among the Cherokees withdrew and took an oath of allegiance somewhere. It finally got settled. And it did establish the Indians as a ward.

This is like the situation that arose not long ago when a lawyer from Virginia told the Supreme Court a certain state of facts and said, "Gentlemen that is the law."

And a member of the Court pointed a long finger at him, and said, "That is not the law."

"Well," the lawyer said, "with all due deference, Your Honor, it was the law until you spoke." [Laughter.]

Now, we are not going to repeal any laws. We are just going to make sure that the laws we have passed are interpreted the way we meant them to be interpreted. We are just going to do like the Congress did in the portal-to-portal case.

Congress said in that case, "We are going to give you relief, because the Supreme Court says a miner has got to be paid from the minute he steps on your premises, and you know he's got to put on his miner's clothes and his little goggles and his lamp, and he's got to get in one

of these dinkey cars and go down in the mines, and it will take him 30 or 40 minutes. You won't have to pay him until he gets down there and actually starts digging coal." So, in order to have the laws read the way Congress wanted, not the way the Supreme Court read them, Congress passed the Portal-to-Portal Act in 1947 and took away the rights the Court had said earlier statutes had given to employees. And this was sustained in court.

Now, let me read you what the Constitution says. A lot of people do not realize what these courts have done.

We passed a Constitution that created Federal courts, and it said this as to what they should do: They could have cases affecting ambassadors, other public ministers and consuls, admiralty and maritime, controversies to which the United States would be a party, controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens, or subjects.

That is all the jurisdiction they have got under the Constitution. All the rest of their jurisdiction comes from Congress.

So we can be like this great sheik in the desert named Job. Job was a very powerful man. He was prosperous. He had more servants, more property, more cattle than anybody. And the Devil asked God the privilege to test him.

So the Devil took all his property away from him. He said, "If he has adversity, he's not going to be loyal."

And Job wound up by saying, "The Lord gave, and the Lord hath taken away; blessed be the name of the Lord."

Now we are going to say there is no constitutional issue but from now on blessed be the power of Congress to say, "You can't operate in this field." That is all we are going to do, and there is no constitutional prohibition.

I leave it to the distinguished Senator to say if that isn't correct. We give them relief on what has happened. We say, "Yes, the Court said that, but that isn't what Congress meant." We can certainly give people relief. I don't believe the constitutional issue is going to be a problem.

Further questions?

(No response.)

The CHAIRMAN. Thank you.

Mr. WILLE. Thank you, gentlemen.

The CHAIRMAN. Now, we have the final witness for today, a very distinguished citizen. I was pleased to meet him when I spoke in New York on the 18th, the Honorable Paul R. Fitchen. He is executive vice president of the New York Clearing House Association.

I asked somebody, "What does the clearinghouse do up here, and what does the clearinghouse know about banking?"

"Well," they said, "the clearinghouse clears all these checks that come in here from all over the Nation and the world and settles the accounts between all these great banks in New York." He said, "They know a lot about banking."

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So I am pleased to have as a witness a man who knows a lot about banking, and probably his organization clears more checks than anybody in the world.

Hon. Paul R. Fitchen, will you come up, please, sir.

STATEMENT OF PAUL R. FITCHEN, EXECUTIVE VICE PRESIDENT, NEW YORK CLEARING HOUSE ASSOCIATION

Mr. FITCHEN. Chairman Robertson, Senator Bennett, Senator Proxmire, I appreciate very much being here.

My name is Paul R. Fitchen. I am executive vice president of the New York Clearing House Association.

I appreciate very much the opportunity to appear before this subcommittee in support of S. 1698, a bill which is of substantial importance to the sound development of the banking system of this country and to the banking public. This bill has the firm support of the New York Clearing House Association, an organization formed in 1853 primarily to facilitate the clearance of checks and the settlement of balances among New York member banks, but which has also throughout its history taken an active interest in the development of sound banking and has been called upon by State and Federal regulatory authorities in recent years to undertake particular studies for their benefit.

S. 1698 has been incorrectly characterized by some as a measure to exempt bank mergers from all antitrust laws. This characterization is an obvious distortion of the bill which makes it clear that the antitrust legislation governing bank mergers is that adopted specifically with reference to banks in the Bank Merger Act of 1960 and is to be applied by the specialized Federal banking agencies responsible for the soundness and growth of our bankings system.

It is not my purpose to review the merits of the Supreme Court's decisions in the *Philadelphia Bank* and the *Lexington Bank* cases which have created the need for the present bill. I do, however, want to stress that these decisions must be ranked among the most controversial antitrust decisions and that, in view of the virtually unanimous contrary understanding prior to those decisions of the respective roles of the Federal banking authorities and of the Department of Justice in respect of bank mergers, they have caused considerable confusion over matters which most persons believed had been carefully studied and resolved at the time of the Bank Merger Act of 1960.

As a result of the *Philadelphia Bank* and *Lexington Bank* decisions we are presented today with an anomalous and unsatisfactory system of regulating bank mergers. The Federal banking agencies charged with responsibility for the successful functioning and development of the Nation's banking system—the Federal Reserve Board, the Comptroller of the Currency and the Federal Deposit Insurance Corporation—are required by the Bank Merger Act to consider at length the proposed merger or acquisition of any insured bank, and the approval of whichever of these agencies has primary responsibility for the surviving institution must be obtained before any such merger or acquisition can occur.

In acting upon a proposed merger or acquisition, these banking agencies are explicitly charged with determining "the effect of the

transaction on competition (including any tendency toward monopoly)" in addition to the several other considerations peculiar to banking which are set forth in the act, and "in the interests of uniform standards" the agency charged with reviewing the proposal must obtain the views not only of the two other Federal banking agencies but also of the Attorney General, who is thus afforded a full opportunity to present the Department of Justice's views on the competitive consequences of the transaction. Yet, despite this considered determination, which must fully take into account probable competitive consequences and which is made by an agency with specific expertise in the structure and functioning of the banking industry, a merger or acquisition duly approved under the Bank Merger Act may today be challenged by the Justice Department under the Clayton Act, the Sherman Act, or both—and this challenge may come years later when the relief sought will be the breaking asunder of the institution formed by the duly approved merger or acquisition.

It is clear to me that such a system would never have purposely been created by the Congress. Having reached this undesirable posture through two surprising Supreme Court decisions which were wholly unforeseen when the Bank Merger Act was enacted, there seems every reason to rectify the situation.

I respectfully submit that the agencies which regulate banking are more competent to judge competitive factors in banking than an agency which seeks to regulate competition in many other lines of endeavor. For example, although a merger of two banks eliminates one competitor from the market, it may well, and often does, greatly enhance competition between the banks in the area through the greater competitive strength of the resulting institution and the challenge to the other competing banks to meet it. As was shown in a study published in 1964 by the New York State Banking Department, entitled "Branch Banking, Bank Mergers and the Public Interest," the public has almost always benefited from recent mergers in my State.

New York City banks are in direct competition with banks all over the country and to some extent with banks in foreign countries. We therefore believe in encouraging competition between banks both in New York and elsewhere because only through competition can we in New York maintain our position in the financial world.

The application of the general antitrust laws, particularly to mergers and acquisitions, is fraught with difficult economic questions and many uncertainties at best. To have these laws applied to an industry as unique and as subject to State and Federal regulation as is banking, by enforcement agencies and courts having little experience with or responsibility for the functioning of our banking system, greatly compounds these difficulties. The confusion is complete when one tries to reconcile why Congress has directed the Federal banking agencies reviewing proposed mergers to consider several important factors affecting the public interest and the soundness of the banking system in addition to the probable competitive consequences of the transaction, whereas the courts are now able to reverse an approval of a banking agency on the basis of the latter factor alone. If this situation goes uncorrected, the Congress, by default, will have given to an unspecialized enforcement agency

what in practical effect will often amount to a veto over bank mergers which qualified and experienced Federal banking agencies find to be in the public interest and without offsetting adverse effects on competition.

The regulatory system which the present bill would reinstate—and which corresponds to that which (prior to the *Philadelphia Bank* and *Lexington Bank* decisions) most persons thought existed—appears to me unquestionably superior.

Banking has long been regarded as quasi-public in nature and so affected with the public interest that extensive governmental regulation is necessary. Thus, entry into banking is regulated not only by the normal competitive demands of the marketplace but by State and Federal banking authorities which grant charters for new banks only if convinced that the public interest dictates; and the establishment of branches is similarly restricted. Banks are also subject to close, continued, and detailed examination and surveillance by State and Federal banking authorities and are subject to legal lending limits, reserve requirements, restrictions on rates of interest paid for time deposits, restrictions on engaging in activities such as underwriting and on making investments, restrictions on directorships, and a host of other regulations. And although banks are free to select their customers and, within limits, to set the interest rates they charge, they are necessarily responsive to Federal monetary and other policies affecting the national economy and well-being.

A bank is simply not in the same category as a food processor or a chemical manufacturer, and the economic soundness and probable consequences of a bank acquisition or merger cannot be judged in the same manner. Banking is far more akin to the communications, railroad, airline, and marine shipping industries in respect of each of which the approval of a merger by the Federal agency charged with responsibility for regulating that industry exempts the merger from later attack under the Clayton or Sherman Acts. These agencies, like the Federal banking agencies, are in turn given the authority to disapprove mergers and acquisitions which are not found to be in the public interest, and the applicant companies generally have no recourse to the courts to ask that the unfavorable determinations of these regulatory agencies be reversed.

The Federal banking agencies, as specialized regulatory bodies, are in a far better position to make what should ultimately be the controlling determination in respect of a proposed merger or acquisition; namely, will it be in the public interest, taking into account the relevant considerations set forth by the Congress in the Bank Merger Act?

These agencies are directed by men appointed by the President, with the advice and consent of the Senate, who are selected because of their competence in banking or related matters. They have developed permanent staffs with an experience and understanding of the banking system unparalleled in our Government and they have the ability and the responsibility to make complete statistical and qualitative analyses and studies of proposed mergers. They are acutely aware of current trends and problems in commercial banking and of its interrelationship with other segments of the financial industry, and they bring to bear in their determinations an expertise

born of a continuing responsibility rather than one developed largely for the purpose of attacking the proposed transaction and built upon analogies to the economics of, and competition in, wholly unrelated industries.

The desirability of assigning this role to these agencies was recognized, of course, at the time that the Bank Merger Act was adopted and was clearly reflected in the directive to those agencies to test proposed bank mergers by the several criteria enumerated in that act rather than by considering probable competitive effects alone.

I want to emphasize most vigorously that the Bank Merger Act and S. 1698 are not antitrust exemption statutes. They simply place the final determination of the favorable or unfavorable competitive aspects of a bank merger in the hands of the expert bank regulatory agencies.

The Federal banking agencies have, of course, placed considerable importance on probable competitive effects in reviewing proposed mergers and acquisitions under the Bank Merger Act. I believe it is fair to say that this factor has been of paramount importance in their determinations.

Further, it should not be overlooked that under the Bank Merger Act banks must justify an acquisition or merger as being in the public interest. Thus, where no affirmative public benefits can be shown, a bank merger may be disapproved upon a finding of probable adverse competitive consequences which would not be sufficient to cause the transaction to violate the Clayton or Sherman Acts.

The state of competition in the banking industry at the present time certainly does not indicate that the banking agencies, in approving bank mergers during the considerable period of time when such mergers were not challenged by the Justice Department because of the assumed inapplicability of the Clayton Act, permitted mergers which affected competition in banking adversely.

It is true that there have been a considerable number of bank mergers since World War II. But given the very high degree of diffusion of the banking industry in 1945, the need for larger banking units to provide adequately the more extensive public banking services required and to meet the larger credit requirements and business needs of commercial customers, and the increasingly high degree of competition from nonbank financial institutions, these mergers and acquisitions appear not only to have been desirable but probably to have been essential to the sound development of our banking system as we know it today. If this development had been thwarted by the application of generalized theories of competition to an evolving banking system whose needs the courts and enforcement agencies were not directed, and were ill equipped, to evaluate, the injury, to banking and to the public could, I submit, have been great.

I can speak with most familiarity of banking in New York City and, to a lesser extent, New York State. There have probably been as many bank mergers in New York City since 1946 (there have been 43 such mergers) as in any other community of the country, and yet I know of no place in the world today where banking competition at all levels is more intense, and the resultant extent and variety of banking services provided to both retail and wholesale customers is so great, as in New York City. Over 60 commercial banks serve New

York City through more than 700 offices, and the competition among them is intense.

To illustrate the extent of this competition, New York City banks have consistently charged materially lower interest rates on short-term business loans than banks outside the city. For the first quarter of 1965, for example, the average rate charged by New York City banks was 4.74 percent, while that reported for banks in 19 large cities averaged 4.97 percent in 7 northern and eastern cities other than New York averaged 5 percent, and in 11 southern and western cities averaged 5.27 percent. Similarly, although published statistics are not available, it is generally believed that rates on personal installment credit extended by New York City banks are as low, and in most cases lower, than elsewhere in the country.

Banking in New York City has not become unduly concentrated in the hands of its largest banks. As of the end of 1963, in all but 3 of the 15 most populous cities of the country (on the basis of the 1960 census) the 5 largest banks held a greater proportion of assets, deposits and loans than did the 5 largest banks in New York City.

Further, in the area in which, under State law, New York City banks may have branches—i.e., New York City and the adjacent counties of Nassau and Westchester—there are now over 80 banks with approximately 1,050 offices.

It may interest the subcommittee to know that as of December 31, 1960, the five largest New York City banks had 59 percent of the branches in this area and that as of March 1965 this percentage had declined to 57 percent.

Banks have not been deterred from securing charters or opening initial branches in New York City. Since 1960, 21 banks have opened their doors in New York City for the first time, including 4 newly chartered banks, 2 large suburban banks which opened branches in the city and 15 foreign banks which established branches pursuant to amendments to the New York banking law which were sponsored by the New York Clearing House Association and which authorized them to provide a full range of banking services through such branches.

Further, the growth in assets experienced by the moderate and smaller sized State and National commercial banks in New York City during the past 5 years has kept pace with that of the larger banks of the city.

I might interpolate, it has more than kept pace. The larger banks in the city have shown a 32-percent increase, all other banks a 38-percent increase.

In competition for customer patronage New York City banks have expanded their services and facilities aggressively. Branch offices have been opened at a rapid rate not only in Manhattan but in the four other boroughs of the city, and since authorized by State law in 1960, in the adjoining counties of Westchester and Nassau.

In New York City alone the number of commercial banking offices increased from 609 in 1955 to 718 in 1964, and also 55 offices have been opened by New York City banks in Westchester and Nassau Counties since 1960.

Competition for deposits led New York City banks to become innovators in the widespread use of time certificates of deposits and other

means for stimulating deposits, including many designed to appeal to small businesses and individual depositors. Intensive campaigns for savings deposits have been instituted and rates paid are the highest permitted by Federal Reserve regulations. Competition in consumer, automobile, real estate and business loans has been similarly intense and has prompted increased efforts by New York City banks to provide better and more extensive services to the public.

That the mergers of New York City banks approved by the Federal agencies did not impair competition is, however, but part of the picture. The Banking Department of New York, in its report on branch banking, bank mergers, and the public interest which is previously mentioned in this statement, has concluded after a study of the effects, other than competitive effects, of 205 bank mergers in New York State (including 18 in New York City) from January 1, 1951, through December 31, 1961, that:

> * * * the great majority of bank mergers in New York State have been, on balance, beneficial to the interests of the public both in terms of their immediate and overall effects, including the longer range effects, although some mergers have had detrimental effects, on balance (p. 29).

The supporting findings underlying this conclusion confirm the desirability of permitting bank mergers when the bank regulatory authorities responsible for the banking system conclude, after giving full consideration to competitive and other factors, that such transactions will benefit the public interest. The study found that, judging these mergers in terms of whether they produced banking benefits to the public, but without attempting an analysis of competitive consequences, the mergers produced immediate overall beneficial effects to the public in 87 percent of the cases examined and resulted in beneficial changes of bank policies in 95 percent of the cases. Most of the mergers found to have had overall detrimental effects occurred prior to the passage of the New York Omnibus Banking Act which set forth criteria for approvals of mergers (including consideration of competitive factors) similar to those contained in the Bank Merger Act, and no consideration was given to individualized beneficial factors such as the solution of management succession problems.

More specifically, these mergers were found generally to have resulted in new services being provided to the customers of the acquired bank, to have increased the ability of the acquiring bank to service larger borrowers and to have opened the way for added competition through the elimination of the statutory home office protection of the acquired bank. Although few changes in service charges, interest rates, and loan policies were found to have occurred in the case of mergers, the study found that such changes as did occur on balance benefited the public and resulted in lower charges and rates and more liberal loan policies.

The foregoing remarks concerning the effect of bank mergers in New York City and New York State are not, of course, submitted in order to justify any particular merger or to suggest that any banking agency—State or Federal—will be infallible in its judgments in respect of bank mergers or acquisitions. I do submit, however, that the State and Federal banking agencies charged with the responsibility for administering our banking laws are conscientious and skilled professionals whose understanding of the banking system and its needs

uniquely qualifies them for this function, and whose past record, independent for the most part of the Department of Justice and the courts, clearly demonstrates an ability and will to perform this function in a manner consistent with maintaining vigorous competition while at the same time authorizing mergers and acquisitions beneficial to the banking public. Under these circumstances, it seems clear that the confused regulatory scheme which was brought into existence by the *Philadelphia Bank* and *Lexington Bank* cases should be rectified.

I would like to address myself to one further and important deficiency in this present regulatory system which, even standing alone, would warrant adoption of the present bill. The Bank Merger Act wisely established a system which prohibits bank mergers and acquisitions without prior approval but which insures finality to the transaction if it is thus approved. The two merging banks and the public could, until the *Philadelphia Bank* and *Lexington Bank* cases, proceed with the assurance that the transaction, and their actions taken in reliance on it, would not be upset at a later date.

This stability, so highly desirable in banking, where public confidence is institutional dependability is of great importance, vanishes to the extent that the Clayton Act or the Sherman Act can later be invoked to challenge the completed transaction and require the complete divestiture by one bank of another. That such a disruptive event can occur long after the merger or acquisition in question is eloquently illustrated by the now-famous *Du Pont-General Motors* decision by which Du Pont was forced to divest itself of its interest in General Motors almost 40 years after that interest was acquired. Thus, even if not immediately challenged by the Department of Justice because of the Department's preoccupation with other matters, its current view of the law or otherwise, a bank merger could be challenged under the antitrust laws at a later date when the Department's interest may shift, later cases delineate new legal criteria or, perhaps, a subsequent merger or other event draws attention to the acquiring bank.

Further, even if the Department of Justice challenged a bank merger through the prompt initiation of judicial proceedings, the considerable delay usually involved in a de novo trial on the merits (with possible appeals) of so complicated a question as whether a proposed bank merger violates the antitrust laws would often of itself necessitate abandonment of a proposed merger or acquisition which, it must be remembered, will have been pending for a considerable time prior to its submission to, and the review and determination by, the Federal and, in most cases, State banking authorities.

To illustrate the periods of time involved, the merger of Manufacturers Trust Co. and the Hanover Bank was approved by the Federal Reserve Board in September 1961, almost 9 months after the boards of directors of the two banks agreed upon the merger in principle. Litigation of that merger under the antitrust laws commenced immediately but it was not until March 1965, or about 3½ years later, that the trial court rendered its decision. Proceedings before the trial court on the issue of relief are still pending, and no appeals have, of course, as yet been taken.

It is questionable how many banks could hold a pending merger in abeyance for even a portion of what is now over 4 years after the merger was first agreed upon without jeopardizing important cus-

tomer and correspondent relationships in the interim, disrupting the staffs of the two banks, hampering plans for development, and adversely affecting the value to stockholders of their investment.

The lack of finality in bank mergers and asset acquisitions is not a problem confined to mergers which were consummated before the *Philadelphia Bank* and *Lexington Bank* decisions, although the invoking of so radical a remedy as divestiture would seem particularly harsh and inappropriate in those situations in view of the prior understanding of the finality of approvals by the banking authorities under the Bank Merger Act. Equally important, this current lack of finality will have highly undesirable consequences in the future for banks contemplating a possible merger and will, I believe, be a serious deterrent to bank mergers or acquisitions which would be of public benefit.

In concluding, I would like to emphasize to the subcommittee that the New York Clearing House Association and its 11 member banks believe strongly in the necessity for preserving a vigorously competitive banking system. The high degree of competition in banking has been a major factor in the economic progress of this country and is essential to the vitality and growth of a banking system which can adequately meet the expanding needs of the public. I believe you will find that bankers in New York City are as vitally interested in fostering efficient and competitive banking as are the Congress and the State and Federal banking agencies.

We do not suport the present bill because of any belief that banking should be immune from regulatory controls designed to insure the continuance of this high level of competition. On the contrary, we endorse the emphasis which was placed on the preservation of competition in the Bank Merger Act, and we support this present proposal because we believe that a regulatory system providing for the sound application of these controls in respect of bank mergers by banking agencies uniquely qualified to administer them is the best and soundest means of assuring that such competition is maintained.

Thank you.

The CHAIRMAN. You have given us a very helpful statement based upon practical experience and personal observation, and that is always the best testimony.

How long have you been connected in one way or another with banking matters?

Mr. FITCHEN. Forty years, Senator.

The CHAIRMAN. Can you give us a rough estimate by the week or month or year of the volume of checks that go through the organization of which you are now the operating head, or the executive vice president?

Mr. FITCHEN. I can as to dollars, not as to pieces. It is almost impossible to get any count on pieces. But there is currently passing through the clearinghouse each day between $4½ and $5 billion in checks.

The CHAIRMAN. Each day?

Mr. FITCHEN. And last year for the first time our total exceeded $1 trillion.

The CHAIRMAN. Now, you know what you are talking about when you say that not only it is competition in New York from the rest of the Nation, but also from foreign countries.

Mr. FITCHEN. That is true, Senator.

The CHAIRMAN. I thought you were very effective when you said, based on 40 years of experience, that these mergers should be handled by banking agencies and not by the Antitrust Division, that you did not think the principles applicable to antitrust laws should be the controlling tests. They should not be ignored but they should not be the controlling test of bank mergers.

Mr. FITCHEN. That is correct.

The CHAIRMAN. Then, based on actual experience, you tell us that after five of the largest banks merged, their percentage of the banking business dropped.

You told us that there are more places doing banking business in New York since these mergers than there were before.

You had told us that the assets of those that haven't merged increased faster than those that did merge.

You are testifying from actual experience that the argument that these bank mergers were illegal because they would unduly restrict competition just wasn't borne out by the facts.

The Senator from Wisconsin.

Mr. FITCHEN. May I just correct one point, Senator Robertson?

The CHAIRMAN. Yes, indeed.

Mr. FITCHEN. The sharper increase in assets and deposits was of the smaller banks as compared with the larger banks. Some of those smaller banks also merged.

The CHAIRMAN. I am glad to have that point cleared up.

Senator PROXMIRE. Is it not true, Mr. Fitchen, that the Department of Justice, since it does bring cases very rarely, primarily performs the role of keeping the regulatory agencies more alert than they otherwise might be to competitive factors?

After all, the Department of Justice is making a recommendation they can then follow up. But isn't it more likely that the regulatory agencies, being run by human beings, are likely to be more sensitive because they might feel that they would be reversed by a court and consequently more reluctant to approve a merger that might be destructive of competition?

Mr. FITCHEN. For one thing, I think that what the Department of Justice has done in attacking cases so far is no index of what it might do in the future.

I feel myself that the Department of Justice was as surprised as most bankers were at the change of attitude toward the applicability of the Clayton Act.

Now——

Senator PROXMIRE. You mean they brought the case with the feeling that they were going to lose it?

Mr. FITCHEN. No, I don't mean that. I mean that the few cases that have been brought so far by the Department of Justice are no indication to me that they will not attack more mergers in the future.

Senator PROXMIRE. But at the same time they have to win in court. It is not enough for them to decide. It is up to a court to decide on the basis of all the evidence.

Furthermore, it seems to me that this very eloquent testimony you have given us on the growth and vigor of competition in New York City, especially much of it since 1960, suggests that the merger bill

which was designed, as I understand it, in very large part to prevent headlong mergers has been effective in promoting competition and that the action of the Department of Justice since the *Philadelphia* case has also been a contributing factor in a healthy, vigorous, banking situation in New York.

Mr. FITCHEN. I feel that the requirements of the past 5 years for greater banking services in New York have expanded so sharply that it was quite necessary for banks to expand in their ability to serve—more branches, greater size. The necessity was for banking to keep pace with the increase in the economy.

Senator PROXMIRE. But they did. They were able to do so.

Mr. FITCHEN. Right.

Senator PROXMIRE. And do you feel they are inhibited right now under present law? They are doing a great job, and your testimony here this morning is the strongest testimony we have had on New York. As the chairman has said, you are certainly brilliantly qualified to tell us. And what your testimony reveals is that they are doing mighty well.

And for that reason I am temporarily disinclined to favor a change that would be as drastic as putting the Department of Justice only in an advisory position.

Mr. FITCHEN. I can't say that I feel they have been inhibited. I think that the role of the Department of Justice is properly an advisory role, and that the expertise and the broader based appraisal of factors that you would get in the Federal agencies would be a sounder ground or base on which to determine the public interest in proposed mergers and acquisitions.

Senator PROXMIRE. On page 9 you quote from the banking department. The last clause says:

> * * * although some mergers have had detrimental effects, on balance.

This refers to the situation from January 1, 1951 through December 31, 1961. During most of that period the Robertson bill was not in effect. It was passed, as you know, in 1960. And, of course, the Department of Justice wasn't as active during that period.

This does indicate there were some mergers that had detrimental effects. It is only relatively few that have been prevented by the Department of Justice.

Why wouldn't we feel that perhaps this present protection against just a few mergers isn't a good idea? The New York Banking Department found that there were some adverse mergers which had taken place on the basis of their review.

Mr. FITCHEN. I have copies of that study which I would be glad to make available but I couldn't from my recollection develop the basis of the Department's concluding that a very few of them were on balance adverse.

Senator PROXMIRE. Then there was one other thing. The preceding witness, Mr. Wille, I thought made a very, very impressive appearance, and it is documented by a study I have here which shows the mergers that have taken place from November 16, 1961, through April 19, 1963. (See p. 172.) It is a very helpful table because it indicates the Department of Justice view, the Board of Governors' view, and the FDIC view. And in case after case the Department of Justice would say, "substantially adverse," the Board of Governors

would say, "slightly adverse," the FDIC in some cases, "not adverse," and so on. But there is such an inconsistency that it would seem the argument of Mr. Wille that you should have some uniformity and treat all banks alike since they are competitive has great force.

You can go down through case after case after case here where one agency will say it's not significantly adverse and the other will say it is very adverse. The result, therefore, would be to penalize those banks that are under an agency which has a stringent view of the law as compared to an agency which has a more lenient view.

Mr. FITCHEN. I personally feel that some divergence among the experts is helpful rather than to have agreement all the way down the line.

Senator PROXMIRE. Well, it is helpful to the banks that have the agency regulating them that is lenient. But it is not very helpful to the others and certainly not helpful overall in terms of treating people alike.

Mr. FITCHEN. I am thinking of helpfulness from the standpoint of the public good, Senator. I think that, picking up a point that was discussed before my coming to the stand, if you have a majority of the banking agencies opposed to a proposal I would feel that that proposal should not be approved.

Senator PROXMIRE. And that recommendation is by the Independent Bankers' Association. You think that where you have two of the three agencies recommending against merger you are inclined to feel it shouldn't be approved?

Mr. FITCHEN. That would be my view, and I am not speaking for the clearinghouse banks.

Senator PROXMIRE. One other point. You feel much of the evil perhaps could be taken care of by limiting the Department of Justice to a definite period for suit? I note in the last part of your statement you pointed out the greatly adverse effect of bringing suits months, even years, after merger has been consummated. Thirty days would be at least an improvement, but you would go further in eliminating the Department of Justice——

Mr. FITCHEN. I think it would be most desirable to have the bill as drawn, but I think that 30 days would be a reasonable and acceptable period of time if it shall be necessary to use that approach.

Senator BENNETT. Mr. Chairman, may I follow that up?

The CHAIRMAN. Yes, sir.

Senator BENNETT. As a matter of fact, if there is any waiting period after the announcement during which the Department may make an announcement it intends to take the case to court, haven't you effectively killed the merger at that point except in very rare cases?

It would seem to me that if two banks or the directors of two banks were preparing to merge and they are now on notice that the Department of Justice reserves the right to take them to court and they face the prospect of the long period of time to which you have referred, as well as the high cost, that the normal human reaction to that kind of a threat hanging over your head, not merely indefinite but specific, is to say, "We'd better give it up. We can't afford to go through this."

And it would seem to me if I were a stockholder I would say, "Well, this is a good investment for me to unload now because we have got all of these uncertainties hanging over our heads."

So I think that it could well be that the adoption of a law which says there is going to be a period of time in which the Department of Justice can stake out its claim to a future court case is going to have the general effect of killing every merger on which it takes that position.

Mr. FITCHEN. I would rather see, if it is necessary to have a period of time, an arrangement under which the Department of Justice would have to have the support of at least one of the Federal agencies.

Senator BENNETT. Why couldn't that period be ended on the day or why couldn't that period end with the day on which the announcement is made? Why should they have time after the announcement is made in which to set up this threat? Don't you think they could make their decision by the time they are prepared to make their advisory recommendation?

Mr. FITCHEN. I think the most desirable way would be as the bill provides—no additional time. But I think that if it becomes necessary and practical to consider giving them additional time, as I have just said, my own preference would be to see a necessity for their position to be supported by a negative attitude on the part of at least one of the supervisory agencies.

Senator BENNETT. If this were done before the decision is announced, would it provide an opportunity for the banks that propose to merge to go back and recast their proposition or figure out some way by which the objection can be overcome without this all becoming public knowledge?

Mr. FITCHEN. It might. It would depend on cases I would think.

Senator BENNETT. Yes, it would have to depend on cases.

I was interested in your comment that you doubted that the rate at which the Department had intervened in the past could be assumed as the rate for the future. And this set my mind to running. The fact that it won these two cases would seem to me to give a spur to the Department of Justice to try more.

It was actually not until it won the first victory that it realized that it had any power in this area to win any victory.

Men like to use power when they find they have it, and the Department of Justice has to create records of having instituted so many cases and won so many cases. So I think this increases the threat—the fact that these decisions have been made.

I was interested in the discussion a minute or two ago about the question of how much more convenient and tidy it is to have a single voice to make the decision. I look around me at this process of which we are a part. It was said of Mussolini that he always made the railroads run on time. But the very genius of our system of government is that there is an opportunity for a variety of opinions and that we don't try to get the benefit of quick solutions by trying to eliminate disagreements.

Do you see any reason why we should change that with respect to the decisions on bank mergers?

Mr. FITCHEN. I would not look favorably, on the strength of hearing this first this morning, on a single agency to decide on mergers. I would think that there would be the same differences of viewpoint within the membership of this one body. I would think that there would be the same tendency to establish records, perhaps to try consciously or unconsciously to secure advantages for one of the segments of the banking system.

I think the experts could disagree in one body just as the experts now disagree in the three agencies.

And I think that there is some kind of salutary effect in having the pull and haul of three independent groups in addition to the responsible final determining agency to give their views on each proposal.

I think there is a great deal to be said for a program under which ultimate responsibility for approving or disapproving a merger falls on one agency but with the views of the others.

Senator BENNETT. No further questions, Mr. Chairman.

The CHAIRMAN. Well, you should feel highly complimented when the distinguished Senator from Wisconsin, who has heard all the witnesses, said your testimony is the strongest we have had on New York, because you are really in fast company. We have had the top experts of the Nation before us. We appreciate what they have said, and we appreciate what you have said, and we thank you very much.

The bells mean that we have got to go and vote on the big public works bill. And without objection I will put in the record the fine speech by a member of the Federal Reserve Board on the problems involved in bank mergers (p. 241) and also an analysis of the Clayton Act prepared by legal counsel (p. 324).

The CHAIRMAN. The committee will stand in recess subject to the call of the Chair.

Thank you, sir.

(Whereupon, at 12 noon, the subcommittee recessed, subject to the call of the chairman.)

(The following material was ordered inserted in the record by the chairman.)

SENATE COMMITTEE ON BANKING AND CURRENCY,
Washington, D.C., May 27, 1965.

Hon. HENRY H. FOWLER,
Secretary of the Treasury, Department of the Treasury,
Washington, D.C.

DEAR MR. SECRETARY: The testimony of outside witnesses on my bank merger bill, S. 1698, has been concluded. Before we close the hearings, I am writing to say that if you desire to be heard on this bill, either Tuesday or Wednesday of next week, that privilege will be gladly afforded to you.

With kind regards, I am,

Sincerely yours,

A. WILLIS ROBERTSON, *Chairman.*

(Similar letters were sent to the Justice Department and the FDIC.)

THE SECRETARY OF THE TREASURY,
Washington, D.C., May 28, 1965.

Hon. A. WILLIS ROBERTSON,
Chairman, Committee on Banking and Currency,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of May 27 stating that if I desire to be heard on the bank merger bill, S. 1698, either Tuesday or Wednesday of next week that the privilege will be afforded to me.

I have no present desire to be heard on this bill at this time but appreciate very much the opportunity you have kindly offered.

Sincerely yours,

HENRY H. FOWLER.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 28, 1965.

Hon. A. WILLIS ROBERTSON,
Chairman, Committee on Banking and Currency, U.S. Senate, Washington, D.C.

DEAR SENATOR: The Attorney General has asked me to acknowledge and thank you for your letter of May 27 according him the opportunity to appear before your committee on June 1 or 2 to testify on S. 1698.

Since the Attorney General will be unable to appear, we will submit a written report on the bill instead.

I trust this will be satisfactory.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

(Report not received at date of going to press, June 4, 1965.)

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, May 28, 1965.

Hon. A. WILLIS ROBERTSON,
Chairman, Committee on Banking and Currency, U.S. Senate, Washington, D.C.

DEAR SENATOR ROBERTSON: Thank you for your letter of May 27, 1965. I am very sorry that the schedule of your subcommittee and my prior commitments make it impossible for me to appear either Tuesday or Wednesday to testify respecting the bank merger bill, S. 1698.

I hope that events permit a further opportunity for me to appear before the subcommittee in the near future. I am sure that you know my personal views concerning the need for this legislation.

With kind personal regard.

Sincerely yours,

K. A. RANDALL, *Chairman.*

List of State bank associations that have adopted resolutions in favor of S. 1698:

Alabama	Louisiana	Ohio
Arizona	Massachusetts	Oregon
Arkansas	Michigan	Pennsylvania
Colorado	Missouri	Rhode Island
Delaware	Mississippi	South Dakota
Florida	Nebraska	Tennessee
Georgia	Nevada	Texas
Hawaii	New Jersey	Vermont
Idaho	New York	Virginia
Kansas	North Carolina	

COMMERCIAL STATE BANK,
Laurinburg, N.C., May 3, 1965.

Re Senate bill 1698.

Senator A. WILLIS ROBERTSON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR ROBERTSON: The Federal Legislative Committee of North Carolina Bankers Association has unanimously endorsed passage of Senate bill 1698 which you introduced April 5.

Since your bill was introduced I have talked with persons representing about 20 banks, and all of these were of the strong opinion that your bill is a sound one and should be enacted into law.

With personal regards,

Respectfully yours,

EDWIN PATE,
Chairman, North Carolina Bankers Association,
Federal Legislative Committee.

ARIZONA BANKERS ASSOCIATION,
Phoenix, Ariz., May 4, 1965.

Hon. A. WILLIS ROBERTSON,
Chairman, Senate Banking Committee,
Senate Office Building, Washington, D.C.

DEAR SENATOR ROBERTSON: The Executive Council of the Arizona Bankers Association in its meeting of April 29, 1965, adopted the following resolution:

"Whereas it was the expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies—the agencies equipped with the special knowledge necessary to regulate intelligently the American banking system;

"Whereas these uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, relegated the regulatory authorities to advisory roles: Be it

"*Resolved*, That the Executive Council of the Arizona Bankers Association endorses and supports S. 1698 introduced in the U.S. Senate on April 5, 1965, restoring the original intent of Congress as contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulator agency pursuant to the Bank Merger Act of 1960 or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency."

The council is most interested in this bill because of the reasons stated in the resolution and ask your aid and assistance in securing its enactment. If we can do anything to be of further help to you in this regard, please so inform us.

Respectfully yours,

OSMOND A. BURTON, *Secretary.*

PENNSYLVANIA BANKERS ASSOCIATION,
Harrisburg, Pa., May 4, 1965.

Hon. A. WILLIS ROBERTSON,
Chairman, Senate Banking and Currency Committee,
U.S. Senate Building, Washington, D.C.

DEAR SENATOR ROBERTSON: At the recent meetings of the Executive Committee and Council of Administration of the Pennsylvania Bankers Association, S. 1698 came in for lengthy discussion and I am very pleased to advise you that both of these bodies enthusiastically endorsed a resolution urging immediate adoption of this bill by the Congress.

It is, therefore, with much pleasure I enclose several copies of the resolution and assure you that we are anxious to lend all possible support to the bill.

With kindest personal regards, I am,

Sincerely,

BELDEN L. DANIELS.

RESOLUTION RE S. 1698, A BILL TO AMEND THE BANK MERGER ACT

Whereas most bankers and lawyers and a large number of Members of Congress believed that the effect of the Bank Merger Act of 1960 would be to permit the Federal banking agencies to make the final decision on the approval of proposed bank mergers on the basis of a public interest test which would require the balancing of both competitive factors and other banking factors specified in the act; viz, the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of the Federal Deposit Insurance Corporation Act; and

Whereas it was also very widely believed that the standards of the Bank Merger Act would not permit the approval of a bank merger to depend solely on the competitive factors and that the opinion of the Justice Department on the basis of the antitrust laws with respect to a merger would be advisory and would not

necessarily control the decision of the appropriate Federal banking agency; and

Whereas the interpretation of the Bank Merger Act has resulted in actions to enjoin bank mergers exclusively on the basis of the antitrust laws without regard to the banking factors considered by the Federal banking agencies in giving their approval and has also resulted in court orders to break up banks formed in mergers consummated pursuant to the Bank Merger Act; and

Whereas the threat of antitrust actions has prevented the proposal of bank mergers which might have been approved under the standards of the Bank Merger Act; and

Whereas the actual operation of the Bank Merger Act has accordingly produced doubt, confusion, and highly complex legal problems that interfere with normal and legitimate changes in banking structure that would be in the public interest; and

Whereas the breakup of a bank formed in a merger duly approved by a Federal banking agency as a result of a court decree could create a shockingly dangerous threat to the stability of the bank involved and the interests of its depositors, creditors, customers, and shareholders; and

Whereas the actual operation of the Bank Merger Act and the problems it can be expected to create in the future, if continued in its present form, are adverse to the public interest which the act states that it is intended to promote; and

Whereas the final and conclusive approval of bank mergers should be made by the Federal banking agencies which are best informed of the needs of the public, of the complex operation of the banking system, and of the practical application of the standards set forth in the Bank Merger Act; and

Whereas the Federal banking agencies may be fully relied upon to guard the maintenance of competition in banking and are especially competent to weigh that objective with the equally important objectives of the banking factors specified in the Bank Merger Act; and

Whereas an amendment of the Bank Merger Act is necessary to enable the Federal banking agencies to have the final power of decision on approval of a bank merger: Now, therefore, be it

Resolved, That the Pennsylvania Bankers Association strongly urges the immediate adoption by the Congress of S. 1698 which would provide a specific exemption from the antitrust laws for mergers duly approved by the appropriate Federal banking agencies pursuant to the Bank Merger Act and which would provide for the respose of actions heretofore instituted against banks formed in mergers approved under the act; and be it further

Resolved, That the officers of this association be directed to communicate this policy to each Member of the U.S. Senate and the House of Representatives from the Commonwealth of Pennsylvania, to all members of the Senate Committee on Banking and Currency, and other appropriate officials of the U.S. Government.

I, B. L. Daniels, secretary of the Pennsylvania Bankers Association, certify the foregoing to be a true copy of the resolution adopted by the Council of Administration of the Pennsylvania Bankers Association at its meeting at Skytop, Pa., on April 26, 1965.

B. L. Daniels, *Secretary*.

Florida Bankers Association,
Orlando, Fla., May 5, 1965.

Hon. A. Willis Robertson,
U.S. Senate, Washington, D.C.

My Dear Senator: We join you and the ABA in solid support of your S. 1698 as indicated in the enclosed resolution. We are asking our bankers all over the State to express themselves to both Senators Holland and Smathers to support this clearly needed legislation.

Best regards.

Cordially,

Floyd Call,
Executive Vice President.

Resolution re the Robertson Bill, S. 1698

The Florida Bankers Association commends Senator A. Willis Robertson for his continuing concern and efforts toward improved bank legislation, especially in the field of bank mergers. The expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 was to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies—the agencies equipped with the special knowledge necessary to regulate intelligently the American banking system.

These uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, relegated the regulatory authorities to advisory roles.

The Florida Bankers Association endorses and supports S. 1698 introduced in the U.S. Senate on April 5, 1965, restoring the original intent of Congress as contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960 or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency.

Approved by: Administrative Committee, Florida Bankers Association, April 28, 1965.

Vermont Bankers Association, Inc.,
Burlington, Vt., May 7, 1965.

Hon. A. Willis Robertson,
U.S. Senator from Virginia,
Senate Office Building, Washington, D.C.

Dear Senator Robertson: Enclosed find copy of a resolution regularly adopted by the executive council of the Vermont Bankers Association, Inc., supporting your bill on control over bank mergers.

We are pleased to send you this document, and we have sent a copy to our Senators and to our Congressman.

Sincerely,

W. L. McKee, *Executive Secretary.*

Resolution

Whereas it was the expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies—the agencies equipped with the special knowledge necessary to regulate intelligently the American banking system;

Whereas these uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, relegated the regulatory authorities to advisory roles: be it

Resolved, That this association endorses and supports bill S. 1698 introduced in the U.S. Senate on April 5, 1965, restoring the original intent of Congress as contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960 or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency.

DELAWARE BANKERS ASSOCIATION,
Wilmington, Del., May 13, 1965.

Hon. A. WILLIS ROBERTSON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR: May I take this opportunity to express my appreciation and that of our membership for your sponsoring bank merger bill S. 1698. Your proposal in bill S. 1698 for that kind of justice we believe our community, our customers, our stockholders, and our banks have a right to expect is most encouraging.

Senator, I am privileged to comply with the directive of our membership by enclosing a copy of the resolution approved at the convention, May 13, 1965. The resolution is in support of your bank merger bill S. 1698.

Our concern is sincere because under the present circumstances every bank merger to date and those of the future would always have the heavy cloud of the Justice Department over its head and no one would know when or where the sudden lightning would strike. It seems only fair to us that a bank merger should be final when approved by the appropriate bank supervisory agency.

We do feel secure, Senator, in our convictions that no merged bank can be dissolved equitably or fairly, that to dissolve a merged bank does disrupt a community and that under present conditions many banks that should be merged in the future for the good of the depositor, and the community will not take place because the directors and officers will not wish or desire to subject their bank, their customers and their stockholders to possible future dissolvement by the Justice Department.

For these reasons and others we again thank you for sponsoring bill S. 1698 and have respectfully requested the support of our Delaware Senators and Congressman.

Best personal regards,
Sincerely,

MARSHALL C. TYNDALL, Sr., *President.*

RESOLUTION

Whereas it was the expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, that is, those agencies equipped with the special knowledge necessary to regulate intelligently the American banking system; and

Whereas these uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, relegated the regulatory authorities to advisory roles: Now, therefore, be it

Resolved, That the Delaware Bankers Association, convened in session at its 70th annual convention in Wilmington, Del., endorses and supports bill S. 1698 introduced in the U.S. Senate on April 5, 1965, restoring the original intent of Congress as contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960 or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency; and be it further

Resolved, That this resolution be recorded in the proceedings of this convention and that a copy be sent to Senator A. Willis Robertson, to Senator John J. Williams, to Senator J. Caleb Boggs, and to Congressman Harris B. McDowell, Jr.

NORTH CAROLINA BANKERS ASSOCIATION,
Raleigh, May 13, 1965.

Hon. A. WILLIS ROBERTSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR ROBERTSON: On May 11, 1965, the convention of the North Carolina Bankers Association at Pinehurst unanimously endorsed a resolution supporting your bank merger bill, S. 1698.

I am enclosing a copy of the text of the resolution.

Mary and I join in sending our best wishes to you and your staff.

Cordially,

HARRY GATTON, *Executive Director.*

A RESOLUTION ADOPTED AT THE 69TH ANNUAL CONVENTION OF THE NORTH CAROLINA BANKERS ASSOCIATION

Whereas it was the expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies—the agencies equipped with the special knowledge necessary to regulate intelligently the American banking system;

Whereas these uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, relegated the regulatory authorities to advisory roles: Now, therefore, be it

Resolved, That the North Carolina Bankers Association endorses and supports bill S. 1698 introduced in the United States on April 5, 1965, restoring the original intent of Congress as contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960 with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency; and be it further

Resolved, That this resolution be spread upon the minutes of the association.

HARRY GATTON, *Executive Director.*

IDAHO BANKERS ASSOCIATION,
Boise, Idaho, May 14, 1965.

Hon. A. WILLIS ROBERTSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR ROBERTSON: You will find enclosed a resolution from the Idaho Bankers Association supporting your bill, S. 1698.

We are calling this matter to the attention of the Idaho delegation to Congress and are asking our Senators and Congressmen to support the bill individually.

Please let us know if we can be of additional assistance.

Yours very truly,

THOMAS C. FRYE, *President.*

RESOLUTION

Whereas it was the expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies—the agencies equipped with the special knowledge necessary to regulate intelligently the American banking system;

Whereas these uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, relegated the regulatory authorities to advisory roles: Be it

Resolved, That this association endorses and supports bill S. 1698 introduced in the U.S. Senate on April 5, 1965, restoring the original intent of Congress as

contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960 or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency.

IDAHO BANKERS ASSOCIATION,
THOMAS C. FRYE, *President.*
S. WALTER GUTHRIE, *Secretary.*

MAY 14, 1965.

TEXAS BANKERS ASSOCIATION,
Austin, Tex., May 14, 1965.

Hon. A. WILLIS ROBERTSON,
U.S. Senator,
Senate Office Building, Washington, D.C.

DEAR SENATOR ROBERTSON: Enclosed is a copy of a resolution adopted by the Texas Bankers Association on May 4, 1965, at our annual convention in Fort Worth, Tex. As you will note, our association endorses and supports S. 1698. Please feel free to make whatever use of this resolution you deem to be in the best interests of the bill.

Sincerely,

SAM O. KIMBERLIN, Jr.,
Executive Vice President.

RESOLUTION

Whereas it was the expressed purpose and intent of Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be made in the hands of the appropriate banking supervisory agencies—the agencies equipped with the special knowledge necessary to regulate intelligently the American banking system;

Whereas these uniform and clear standards have been repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases, which decisions have given the final word in bank mergers to the Justice Department and, in effect, regulated the regulatory authorities to advisory roles: Be it

Resolved, That the Texas Bankers Association endorses and supports bill S. 1698 introduced in the U.S. Senate on April 5, 1965, restoring the original intent of Congress as contained in the Bank Merger Act of 1960 that regulation of bank mergers be in the jurisdiction of the appropriate banking supervisory agency, and providing that no proceeding shall be instituted or prosecuted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960 or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency.

VIRGINIA BANKERS ASSOCIATION,
Richmond, Va., May 17, 1965.

Hon. A. WILLIS ROBERTSON,
Senate Office Building, Washington, D.C.

DEAR SENATOR ROBERTSON: We understand that hearings on S. 1698, a bill introduced by you to eliminate the confusion that has arisen in the bank merger field as a result of recent court rulings, will begin on May 19.

You will, I am sure, be interested in knowing that the Executive Committee of the Virginia Bankers Association has voted to give full support of the association to enactment of this legislation. In taking this action the officers reiterated the position that was taken during a discussion of this subject with you in your office on March 25, at which time we urged the introduction of corrective, clarifying legislation.

Bank mergers, in our opinion, require considerations which can best be handled by governmental agencies having special knowledge of the problems involved, including those of a monopolistic nature. We believe the Federal bank regulatory agencies have dealt adequately with the problems in the past and can see no need for injecting the Department of Justice into the picture—armed with a veto power.

In short, the bill you introduced on April 5 would, in our opinion, completely clarify a chaotic situation, which if not corrected promptly could do material damage to the banking structure of this country.

The financial sector of the Nation's economy is indebted to you for the prompt, effective and efficient manner in which you have moved to correct a very dangerous situation in the banking field.

Cordially yours,

MARCHANT D. WORNOM,
Executive Vice President.

RENO, NEV., *May 20, 1965.*

Senator A. WILLIS ROBERTSON,
Chairman, Senate Banking and Currency Committee,
Washington, D.C.:

I am pleased to inform you that all banks in the State of Nevada have been contacted and are in favor of your Senate bill, S. 1698. A resolution is being drawn and will be brought before the Nevada Bankers Association on June 13 for formal approval. Our State Senators and Congressman are being so advised

N. E. SPOTTISWOODE,
President, Nevada Bankers Association.

CONSUMER BANKERS ASSOCIATION,
Washington, D.C., May 21, 1965.

Hon. A. WILLIS ROBERTSON,
U.S. Senator, Senate Office Building, Washington, D.C.

DEAR SENATOR ROBERTSON: I am delighted to enclose a copy of the resolution adopted by the Consumer Bankers Association, giving full support to your bill S. 1698. The members of our executive committee voted unanimously in favor of the measure, and we truly hope that it finds speedy and successful passage.

Sincerely yours,

ROBERT A. FISCHER, *Executive Director.*

RESOLUTION ON S. 1698

Whereas the Bank Merger Act of 1960 was passed by the Congress of the United States for the express purpose of limiting control of bank mergers to the appropriate banking supervisory agencies, those authorities whose prime function it is to intelligently administer the Nation's banking system; and

Whereas the provisions of the Bank Merger Act of 1960 have been set aside by the Supreme Court of the United States in specific instances wherein final decisions in bank merger cases have been directed by the Justice Department, thus preempting the jurisdiction of the banking authorities: Now, therefore, be it

Resolved, That the Consumer Bankers Association endorses and supports bill S. 1698 which was introduced in the U.S. Senate on April 5, 1965, for the purpose of reinstating the primary intent of Congress as exemplified in the Bank Merger Act of 1960, wherein control of bank mergers was vested in the appropriate bank supervisory agency, and providing that no proceeding shall be instituted by the Department of Justice under the general antitrust laws with respect to any bank mergers heretofore or hereafter approved by the appropriate Federal regulatory agency pursuant to the Bank Merger Act of 1960, or with respect to any mergers consummated before May 13, 1960, which were approved by the appropriate State or Federal bank supervisory agency.

The above resolution was unanimously approved by the Executive Committee of the Consumer Bankers Association:

A. E. Batts, senior vice president, Third National Bank, Nashville, Tenn.; Warren R. Bentley, senoir vice president, Lincoln National Bank & Trust Co., Syracuse, N.Y.; L. F. Garlock, Jr., vice president, Winters National Bank & Trust Co., Dayton, Ohio; Hugh W. Haynes, Jr., vice president, Bank of Georgia, Atlanta, Ga.; Joseph A. Hudson, vice president, Lincoln Rochester Trust Co., Rochester, N.Y.; Gordon E. Marks, president, Seminole Bank of Tampa, Tampa, Fla.; A. Scott Offutt, president, First National Bank, Washington, D.C.; George E. Rogers, president, First National Bank in Marion, Marion, Ind.; G. Stewart Webb, vice president, Union Trust Company of Maryland, Baltimore, Md.

MAY 20, 1965.

MISSISSIPPI BANKERS ASSOCIATION—RESOLUTION ON BANK MERGERS

Whereas Senate Resolution 1698 has been introduced in the Senate of the United States by Senator Willis Robertson; and

Whereas it was the expressed purpose and intent of the Congress when it passed the Bank Merger Act of 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies. These agencies are fully competent to judge wisely and intelligently the advisability and desirability of granting permission to banks to merge; and

Whereas the intent of the Bank Merger Act of 1960 was repudiated by the Supreme Court of the United States in the *Philadelphia National Bank* and the *Lexington Bank* cases. The effect of these decisions is to place in the hands of the Justice Department full power to authorize by negative action or to prohibit by positive action the merger of banks, thus relegating the State and Federal supervisory and regulatory authorities to advisory roles: Now, therefore, be it

Resolved by the Mississippi Bankers Association in official convention assembled, That it endorses the purpose of Senate Resolution 1698, which is to restore the original intent of Congress insofar as bank mergers are concerned that they shall be regulated by the appropriate supervisory agencies; and be it further

Resolved, That the membership of the association be requested to keep itself informed on the progress of Senate Resolution 1698 through Congress, and at the propitious time write your Senators and Congressmen urging support of Senate Resolution 1698. It is further suggested that the association membership inform their corporate customers of the importance of this bill to organized and regulated banking, and, further, that the membership explore the possibility of securing favorable editorial comment in the press of the several communities in the State: be it finally.

Resolved, That a copy of this resolution be sent to Mississippi's representation in the Congress of the United States and to the members of the Banking and Currency Committees of both the House and Senate of the U.S. Congress.

I, Leigh Watkins, Jr., executive director of the Mississippi Bankers Association, do hereby certify that the foregoing is a true and correct copy of a resolution adopted by the said association in official convention assembled on Wednesday, May 19, 1965, in the Buena Vista Hotel, Biloxi, Miss.

Given under my hand and the seal of the association this the 21st day of May 1965.

[SEAL]

LEIGH WATKINS, JR.,
Executive Director.

[Excerpt from "Antitrust Policy, An Economic and Legal Analysis," by Karl Kaysen and Donald F. Turner, 1959]

THE EXEMPT SECTOR

By exempt sector we mean that part of the economy to which antitrust policy does not apply because of legislative exemptions, expressed or implicit. To be sure, this exemption is not complete and in some cases the legislation exempting an industry contains its own antimonopoly provisions. Nevertheless, we can say that the competitive standard applied by regulators is significantly lower

than that contained in antitrust laws, so that the exemptions, combined with the operation of the regulatory agencies, give market behavior in these industries a monopoly character of varying degrees and form. The objectives of antitrust policy are either subordinated to other policy goals or sought through direct regulation.

Our purpose in this section is to give a brief, simplified sketch of the size of this sector, its significance, the extent to which competition is limited in each exempt industry, and the market structure of these industries, should the exemptions be modified or removed. In a later chapter we shall examine the public policy rationale of these exemptions.

The major industries which we classify as exempt, as well as their shares of national income, are listed in table 4. This list is by no means all inclusive. It excludes minor local public utilities such as cemeteries and rubbish disposal, which are regulated in some States and cities, as well as the smaller natural resource industries, such as Colorado molybdenum, which are subject to State conservation laws. Patents, Webb Pomerene Associations, and retail price maintenance represent exemptions so dispersed over the economy that it is difficult to discuss them in the context of a separate exempt sector. The labor market likewise cannot be analyzed by the methods employed for other exempt sectors and hence is also excluded from the following discussion.

TABLE 4.—*Percentage of national income originating in sectors exempt from the antitrust laws, 1954*

Exempt sector	*Percentage of national income*
Agriculture	5.5
Transportation	4.6
Railroads	2.2
Highway freight carriers	1.3
Local and highway transportation	.5
Water transportation	.3
Air transportation (common carrier)	.2
Pipeline transportation	.1
Local and communication utilities	3.7
Electricity and gas	1.9
Telephone and telegraph	1.5
Radio broadcasting and television	.2
Local utilities (not elsewhere classified)	.1
Commercial banking and insurance	2.5
Commercial banking	1.5
Insurance	1.0
Natural resource industries	.9
Crude oil and natural gas	.8
Anthracite coal	.1
Total, exempt private industries	17.2
Government enterprise	1.2
Federal	.8
State and local	.4
Total, exempt sector	18.4

The size of the exempt sector relative to the total economy is substantial. As table 4 indicates, 18.4 percent of national income originates in the exempt sector. The presumption in discussions of antitrust policy is that the exempt sector is and will continue to be marginal. At this point, we will not consider to what extent the present size of the exempt sector undermines this assumption. All we wish to emphasize is the obvious point that the exempt sector cannot be dismissed as involving only a few special situations.

Size alone understates the economic importance of many exempt industries. For instance, transportation is a cost to almost all industries, and its price structure determines in large part the spatial organization of the economy. Prices of transportation help determine the boundaries of regional markets, and in this way help to form the market structures of other industries. The importance of electric power, the economy's principal energy input for households and firms, is aslo greater than its small share of national income would indicate. Commercial banking similarly occupies a strategic position as the major source of short-term credit, as an important segment of the capital market, and as the source of the Nation's money supply. Size also understates the importance of insurance companies, which originate only 1 percent of national income but are a major source of investment funds.

Table 6 of the Statistical Appendix presents in summary form four kinds of information about each of the regulated industries listed: primary regulatory agency, extent and nature of regulation, present market structure, and probable market structure in the absence of regulation. This gives a bird's-eye view of the exempt areas, and serves to point up the existence of two different kinds of regulation: that applying to industries, the structure of which would be monopoly or concentrated oligopoly in any event, and that applying in otherwise unconcentrated or looser oligopoly structures in which regulation may have the effect of changing the market structure.

STATISTICAL APPENDIX TABLE 6.—*Exempt industries, showing the character of their regulation and their market structure*

Industry or industries	Commercial banking.
Primary regulatory agency or agencies	Federal Reserve System, Comptroller of Currency, and State banking commissions.
Nature and extent of regulation	Federal Reserve controls general level of interest rates and availability of credit. Federal and State authorities control bank operations through entry controls and examinations. Limitation of competition is considered by regulation authorities as necessary to stability of banking systems.
Present market structure	National credit market is oligopolistic, as are most local markets.
Market structure in absence of regulation.	Concentration might be reduced, but oligopolistic structures would probably still dominate.

PROTECTING THE PUBLIC INTEREST IN BANK MERGERS

Remarks of George W. Mitchell, Member, Board of Governors of the Federal Reserve System at the Annual Convention of the Pennsylvania Bankers Association, Atlantic City, N.J., May 24, 1965

Because of the vital nature of banking services to the community, every kind of change in banking structure is deemed to affect the public interest, and, accordingly, is subject to regulatory constraint. The sharpest edge of public concern, however, focuses on merger proposals, for they are deemed the most susceptible to being used by bankers to obtain an extra degree of market power—or a dominant place in the market—to the disadvantage of the general public interest in having reasonably competitive markets.

To bankers in Pennsylvania, mergers are not an academic subject. In the last 3 years, Pennsylvania has ranked first among all the States in the Nation in the number of bank mergers consummated. Its 92 mergers over this period are nearly twice the total for New York, the next most active State. It is in the center of a beehive of merger activity that extends from Maine to South Carolina and west to Michigan, Ohio, and Indiana. This area accounts for over 80 percent of recent consolidations. If you are a typical Pennsylvania banker, you are about 4½ times as likely to see your bank struck by merger lightning as is your counterpart elsewhere in the country. In these circumstances, I suspect

a great many of you share my interest in the task I have set for myself today: to explore some of the questions that need to be asked, and answered, about a bank merger to be sure it is not inimical to the public interest.

Public concern with bank mergers has been codified in the Bank Merger Act of 1960 which sets up what might be called an "obstacle course" for proposals to merge banks. Whether a proposal is successful or unsuccessful in traversing that course must be adjudged by one of the three Federal bank supervisory agencies—whichever one will have supervisory responsibility for the institution resulting from the merger.

THE BANKING FACTORS

The Bank Merger Act requires supervisory authorities to consider a set of seven factors in each merger case. The first five are called banking factors. They cover such considerations as the financial history and condition, the adequacy of capital, the quality of management, and the earning prospects of the institutions involved. In a nutshell, the relevant supervisory agency is to judge whether the status of the surviving bank is strong enough to support a merger and if the position of the bank to be merged is so weak as to impel one. Since banks involved in mergers usually are operating institutions and have a record of performance, ample information on these banking factors is usually already in the hands of the supervisory authorities in the form of statistical, examination, and field-contact reports. Weighing the balance of evidence still requires a judgment on which reasonable men can differ, but I think the supervisors can hardly plead a need for more facts and guidance in making judgments on the five banking factors.

The other two factors that supervisors are required to consider under the Bank Merger Act, however, are quite a different matter, because they can involve knotty problems, both of information and analysis. The statute specifically refers to these factors as (1) "the convenience and needs of the community to be served" and (2) "the effect of the transaction upon competition, including any tendency toward monopoly."

COMMUNITY CONVENIENCE AND NEEDS

How does one go about judging whether the convenience and needs of the community will be benefited by a change in banking ownership and management?

One simple technique is to compare the list of services presently offered with the list of those that the new management intends to offer. There are numerous occasions when a greater variety of services is clearly needed by a community, especially when the existing institution has fallen behind the trend in banking accommodations. But equally often an expanded list of specialized bank services will include several that are seldom, if ever, needed because of the modest economic scope of the community's activities.

The critical question, therefore, often becomes: How can one judge the actual breadth and intensity of community demands for various banking services, as distinct from the quantity and quality of services that the existing and proposed new combinations of banks intend supplying?

One possibility is to survey community opinion on the status quo, to find out how both business and household customers appraise the quantity and quality of the banking services available to them. Some investigation along these lines is nearly always made by the field offices of the supervisory authorities in considering a merger application.

It is quite a problem, however, to obtain a sample of community opinion that is unbiased, and informed as well. In particular, it is hard for bank customers to compare services they are accustomed to with those they have never had the opportunity to try out. Such survey results, therefore, should be supplemented by a more sophisticated appraisal. In this connection, the judgment of examiners with a broad experience in the qualitative and quantitative aspects of banking services is particularly helpful.

Another aspect of the impact of bank mergers upon the "convenience and needs of the community" concerns the contribution that banks make to economic growth and stability in their own communities. A bank that is investing heavily in out-of-State business loans, tax-exempt securities, or mortgages contributes less to its community than one that is playing an active role in satisfying the credit needs of local businessmen, farmers, consumers, and governments. Clearly, so far as the community's convenience and needs are concerned, a merger involving the first bank would be far less objectionable from the public point of view than would a merger involving the second.

Bank loan and investment portfolios tell nearly all one needs to know about the degree to which the bank employs its resources locally. Data on local and nonlocal business loans made to trade, construction, manufacturing, or service concerns, and classified by size of borrower, reveal the extent of the bank's participation in the community's business life.

The mortgage and installment paper portfolios, again sorted on a local and nonlocal basis, will indicate the bank's participation in consumer financing, particularly if account is taken of how active the bank has been in writing and servicing local mortgages or in generating consumer credit, compared to the extent to which it simply acts as a broker for these types of credit, or buys such paper from outside sources.

Some banks aid their communities by substantial participation in the short- and long-term financing of local governments, a fact that can be readily ascertained by an examination of their tax-exempt securities portfolio. In these ways—through surveys of community views, informed professional judgments, and a review of the record of bank participation in financing the community, its businesses and its citizens—reasonable bases for judgment can be established as to what the "convenience and needs" of the community are and how well the existing institutions have met them. Against this must be weighed the record and assurances of the merging bank as to what it can and will supply. The final balancing of these considerations remains a matter of judgment but, with evidence before them of the type I have outlined, supervisory authorities should be able to judge with a fair degree of assurance how well a proposed merger meets the "convenience and needs" test.

THE COMPETITIVE FACTOR

Now we come to the hardest criterion of all to apply—the effect of the proposed merger on competition. Of course, the competitive factor cannot be disassociated from consideration of "convenience and needs," inasmuch as the overall objective is to provide the banking services desired by the customers on reasonable terms and at fair prices. Indeed, the most conclusive way of assuring that a community's convenience and needs will be met is by the maintenance of so many alternative banking choices that the resulting competition among them will give customers all the opportunity they could wish to move from one bank to another in order to obtain whatever mix of services they desire. But this is rarely a practical criterion: You know as well as I that there is a limit to the number of practicable banking alternatives that it is possible to make available to any given community.

However that may be, in dealing with a change in the status quo there is a basic presumption that any decrease in the number of independent banking units in a given market area will, of itself, decrease competition and increase the tendency toward monopoly. It is my own feeling that this presumption is too harsh a standard to apply without corroborating evidence. Such evidence is to be found in the extent of any unfilled needs of business and household customers in the market areas affected by the proposed merger. And it is to be found in an analysis of the markets involved in the merger—the alternative sources of banking services, the extent of market power exercised by the banks in these markets, and the role in these markets of the particular banks to be merged and the merging bank.

In evaluating the market impact of a proposed merger, several sources of information can be drawn upon: the periodic examination reports, which provide considerable information on the performance of the banks in their market areas; regularly available economic data; the information supplied by the applicants in their merger applications; and supplemental on-the-spot studies of banking services and needs by field staffs of the regulatory agencies.

One of the first tasks in preparing to evaluate the competitive factor is to develop a reasonably accurate outline of the areas that the merger candidates serve. The approximate boundaries of the service area of each bank are needed in order to identify the markets that could be affected by the merger, and to discover any overlap in the respective service areas.

At present, the primary service area of a bank is usually defined as the geographic area from which the bank derives 75 percent of its demand and time deposits held by individuals, partnerships, and corporations. In my judgment, this definition is deficient in two respects. First, it is based on the assumption that a bank has only one service area. Banks, however, provide a variety of loan and deposit services, each of which is likely to have its own market area—and these areas may vary widely. Secondly, the 75-percent rule, as a rule of thumb,

is probably not as indicative as the banker's own subjective estimate of his market areas, expressed in terms of the areas within which he actively competes with other institutions.

The relevant service areas can be defined more sharply by enumerating each of the major markets in which commercial banks compete. As lenders they compete with each other and other financial intermediaries or with capital markets in extensions of credit to business (large and small), to consumers, and to governments (Federal, State, and local). It is quite evident that in many of these markets the merging of any but the very largest banks is unlikely to have significant anticompetitive effects. Nonbank and non-local-bank competition are major factors insuring competitive performance in the Government securities market, in lending to large businesses, and in the market for tax-exempt State and local bonds. Nonbank competition is typically vigorous in the consumer credit markets, where hard goods suppliers have their own sources of credit independent of local banks. The same is true of mortgage markets, where other specialized financial intermediaries are dominant. In whatever markets banks face substantial nonbank or non-local-bank competition, the presumption is that the impact on competition of any bank mergers will be negligible.

What, then, are the markets in which competitive considerations must be weighed carefully? The most important single market is for demand deposit services to local business and individuals. These are services that can be provided only by a bank, and for most such customers only by a local bank. Another important local market is that for savings accounts; in this instance, however, other financial intermediaries usually offer a similar service. Lately some rate-conscious savers have escaped the orbit of local alternatives altogether and exported their savings to California.

The small-business borrower is another bank customer that may suffer from the removal of an alternative source of bank credit by merger. Even though such borrowers can often obtain trade or supplier credit, the price may be high and the conditions confining. Small businessmen usually find their local banks to be their cheapest, most accessible, and most flexible source of external financing.

In considering the definition of the service area of the bank, then, particular attention should be paid to the potential service areas for small business borrowers and individual and small-business depositors—these are the markets most likely to be significantly affected one way or the other by merger.

When chief concern about the possible competitive impact of bank mergers is narrowed down to these two market sectors, a great many merger proposals can be said not to raise the competitive issue at all. This is because the banks involved have little or no overlap in their service area for small business and personal customers. Such is the case when the major objective of the acquiring bank is to extend its activities into another geographical market or into another service field. For example, in Virginia, a State where there has been a great deal of merger activity in the past 3 years (47), the preponderance of cases have involved the extension of service areas for banking institutions that are, under a recent State statute, becoming statewide in their operation. The competitive effect in these cases is not that of the withdrawal of an alternative source of banking service, but typically the substitution of a branch of a larger institution for a community bank.

It is sometimes said or implied that branches of large banks in small communities are unfair competition for local banks. But there are too many instances in which local banks have held their ground in growth and profitability to support a broad generalization along that line. As a practical matter, it may well be that the communities that are most blessed with banking faciliteis are those that possess a mixture of local banks and branches of larger institutions.

THE HARD CORE

What remains to be considered is the hard core of merger proposals—those that turn out, upon examination, to involve two or more banks with overlapping service areas for small business and individual customers. In such circumstances, consummation of the merger undeniably will eliminate one competing bank from the relevant markets. Authors of such merger proposals must expect to run into heavy weather on the supervisory front. The loss of one alternative for customers in choosing their banking connections in these market areas will weigh heavily with the supervisors, unless the number of actively competing banks is already large, or the bank to be acquired is so small or ineffective a competitor as not to create any appreciable gap in banking alternatives by its disappearance

as an independent entity. Even in this latter instance, however, bank supervisory authorities must be alert to situations whereby an agressive bank can achieve a position of dominance through a succession of mergers of small banks, no one of which adds materially to the market share of the acquiring bank. A review of the past mergers entered into by the acquiring bank should enable the authorities to detect and resist such encroachment.

There are a few extenuating circumstances that could lead supervisors to look with favor upon a merger of two banks competing in a common service area. For instance, if the acquired bank is one of the smaller banks in the area, and if one or two large banks already operate head offices or branches in the area, the merger might actually stimulate competition by introducing a new and lively competitive force. On the other hand, if the acquired and acquiring banks are among the larger banks serving the area, the merger might well serve to dampen competition by creating a dominant institution. There may be certain other market situations in which the merger of two apparent competitors could in practice serve to invigorate rather than reduce the actual competitive rivalry among the surviving institutions, with corresponding benefits to their customers; but such a possibility is sufficiently contrary to the most reasonable expectation to require the fullest kind of documentation in order to be given credence.

Decisions in these "hard core" cases demand the most careful appraisals of the shares of the relevant markets that have been captured by all the individual banks serving such markets and the presumed future effectiveness of these banks as competitors. Such appraisals need to rest on estimates of local loans and investments in each lender's portfolios, on the degree of satisfaction expressed by bank customers, and on the professional judgments of examiners regarding the degree of management aggressiveness. Much of this information can be obtained from published sources and from examination reports. Sample survey techniques can be utilized to elicit a fair representation of customer opinion. Occasionally these sources may need to be supplemented by a field investigation.

When all this evaluation is completed, however, the chances are that any merger proposals found to involve the joining of two vigorous bank competitors with overlapping local service areas are likely to have a high mortality rate. In this category of cases, we supervisors have to be expected to resolve doubts on the side of preserving competition.

A SUMMING UP

This brings me to the end of my description of the obstacle course, erected in the public interest, which each bank merger needs to run. It is difficult in spots; it may often be frustrating; but it is not unconquerable.

Those merger cases that hinge upon the banking factors present straightforward issues that ordinarily can be perceived and resolved with dispatch. Cases in which issues of convenience and need are involved pose tougher analytical problems, but the obtainable data and expert opinion are usually adequate to resolve the issues.

When the competitive issue is central to the decision, the resolution is more in doubt. A good many of these cases also turn out to be manageable given the data and analytical techniques that presently can be brought to bear upon them. But some merger applications will inevitably present situations too closely entwined with potential anticompetitive effects to pass muster, given the current state of our knowledge and understanding. These you must expect to have returned to you, marked "Application denied."

Calendar No. 186

Congress Session	SENATE	Report No. 196

[EXCERPTS FROM]

REGULATION OF BANK MERGERS

REPORT

OF THE

COMMITTEE ON BANKING AND CURRENCY

TOGETHER WITH

SUPPLEMENTAL VIEWS

TO ACCOMPANY

S. 1062

April 17 (legislative day April 15), 1959.—Ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1959

CONTENTS

REGULATION OF BANK MERGERS

April 17 (legislative day April 15), 1959.—Ordered to be printed

Mr. Robertson, from the Committee on Banking and Currency, submitted the fol owing

REPORT

[To accompany S. 1062]

The Committee on Banking and Currency, to whom was referred the bill (S. 1062) to amend the Federal Deposit Insurance Act to provide safeguards against mergers and consolidations of banks which might lessen competition unduly or tend unduly to create a monopoly in the field of banking, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

THE PURPOSE OF THE BILL

The purpose of the bill is to provide for control of all mergers by asset acquisition by banks under the jurisdiction of the Federal banking agencies, under uniform and clear standards calling explicitly for consideration of both banking factors and competitive factors, but without giving sole and controlling effect to any single factor.

At the present time controls over bank mergers are incomplete and confusing, particularly with respect to the competitive factors which may be involved. There are gaps in the controls exercised by the Federal banking agencies under banking statutes, and even where the power of approval is clearly given the standards are not clearly spelled out. Only two State statutes authorizing regulation of State bank mergers and consolidations specifically authorize consideration of competition as a factor in the decision, though in other States this factor undoubtedly is considered under some other standards. Bank mergers are generally considered to be covered by the restrictions of the Sherman Antitrust Act, but up to this year, no proceeding under the Sherman Antitrust Act had been instituted which involved a bank merger or a consolidation. Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from section 7 of the Clayton Act. (Stock acquisitions by bank

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holding companies, as distinguished from mergers and consolidations, are subject to both the Bank Holding Company Act of 1956 and sec. 7 of the Clayton Act.)

In short, at the present time many, perhaps most, bank mergers can proceed with little or no consideration of competitive factors.

The bill would amend section 18(c) of the Federal Deposit Insurance Act to require that all asset acquisitions by insured banks through mergers, consolidations, or assumption of liabilities must have the prior written consent of (1) the Comptroller of the Currency if the acquiring or resulting bank is a national bank or a district bank; (2) the Board of Governors of the Federal Reserve System if the acquiring or resulting bank is a State member bank; or (3) the Federal Deposit Insurance Corporation if the acquiring or resulting bank is a nonmember insured State bank.

In granting or withholding consent to such transactions, the Federal agency involved would be required to consider the banking factors enumerated in section 6 of the Federal Deposit Insurance Act—the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of that act. In addition to these banking factors, the bill would require the banking agency to consider whether the effect of the merger might be to lessen competition unduly or to tend unduly to create a monopoly. In the interest of achieving uniform standards the banking agency having jurisdiction would be required to consult with the other two banking agencies on the competitive and monopolistic aspects of each acquisition.

COMMITTEE AMENDMENT

The committee adopted an amendment to the bill under which the Federal banking agency considering the application would be required to request a report from the Attorney General on the competitive factors involved in the merger. The Attorney General would be required to furnish this report within 30 days in most cases. The 30-day period could be shortened by the agency to 10 days in case of emergency, and further, if the agency should find that it was necessary to take immediate action in order to prevent the probable failure of one of the merging banks, the agency might act without obtaining a report from the Attorney General.

This amendment replaces a provision in the bill as introduced which would have authorized the banking agencies to request the views of the Attorney General, but would not have required them to do so in every case. The committee was of the opinion that it would be appropriate and desirable in every case (except an emergency involving a probable failure of one of the merging banks) for the banking agency involved to get a report from the Attorney General on the competitive factors involved in the merger.

PRESENT LAWS CONCERNING BANK MERGERS AND RELATED MATTERS

Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act (15 U.S.C. 1, July 2, 1890), prohibits any contract, combination, or conspiracy in restraint of interstate or foreign trade or commerce. Section 2 of the act makes it illegal to monopolize, or to combine, conspire or attempt to monopolize any part of interstate or foreign trade or commerce. It is now generally accepted that these sections apply to bank mergers and consolidations by either stock or asset acquisitions (see *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 165–166 (3d Circ. 1953) certiorari denied, 346 U.S. 901 (1953) and see A. A. Berle, "Banking under the Anti-Trust Laws," 49 Columbia Law Review 589), but up to the filing of the Firstamerica complaint in March 1959, in the U.S. District Court for the Northern District of California, Southern Division, civil action No. 38139, the committee understands, no proceedings pursuant to the Sherman Antitrust Act had been instituted involving a bank merger or consolidation.

S. 1062 would not affect in any way the applicability of the Sherman Act to bank mergers or consolidations.

Clayton Act

Section 7 of the Clayton Act (15 U.S.C. 18, October 15, 1914), as originally enacted, prohibited the acquisition by one corporation of stock in another corporation if the effect of the acquisition might be substantially to lessen competition between the two corporations in any community.

Specific exceptions were made for transactions consummated pursuant to authority given by certain regulatory bodies, including the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission. An example of these specific exceptions for regulated public utilities or quasi-public utilities may be found in section 5 of the Interstate Commerce Act (49 U.S.C. 5):

Excerpts from Interstate Commerce Act (49 U.S.C. 5)

SEC. 5. COMBINATIONS AND CONSOLIDATIONS OF CARRIERS.

(1) POOLING; DIVISION OF TRAFFIC, SERVICE, OR EARNINGS. Except upon specific approval by order of the Commission * * * it shall be unlawful for any common carrier * * * to enter into any contract * * * for the pooling or division of traffic * * * : *Provided*, That whenever the Commission is of opinion * * * that the pooling or division * * * will be in the interest of better service to the public or of economy in operation, *and will not unduly restrain competition*, the Commission shall by order approve and authorize * * * such pooling or division * * *: *Provided further*, That any contract * * * to which any com-

mon carrier by water * * * is a party, relating to the pooling or division of traffic * * * lawfully existing on September 18, 1940, if filed with the Commission within six months * * * shall continue to be lawful except to the extent that the Commission * * * may find and by order declare that such contract * * * is not in the interest of better service to the public or of economy in operation, or that it *will unduly restrain competition.*

(2) UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL.

(a) It shall be lawful, with the approval * * * of the Commission, as provided in subdivision (b) of this section—

(i) for two or more carriers to consolidate or merge their properties or franchises * * *

* * * * *

(b) Whenever a transaction is proposed under subparagraph (a) * * * the carrier * * * shall present an application to the Commission * * *. If the Commission finds that * * * the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction * * *: *Provided*, That if a carrier by railroad * * * is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and *will not unduly restrain competition.*

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * *

(11) PLENARY NATURE OF AUTHORITY UNDER SECTION.

The authority conferred by this section shall be exclusive and plenary * * *; and any carriers * * * participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *. [Italics supplied.]

In *McLean Trucking Co.* v. *U.S.* (321 U.S. 67 (1944)) the Supreme Court compared the two standards set forth in section 5(2)(b), and pointed out that the standards set forth in the proviso—"consistent with the public interest" and "will not unduly restrain competition"—are more rigorous than the general standard of the section—"consist-

ent with the public interest" (321 U.S. 67, 84–85; see especially note 21 on p. 84).

In the years following the enactment of the Clayton Act, deficiencies were discovered in the provisions of section 7. Mergers by asset acquisitions became more significant than the prohibited stock acquisitions. And the judicial interpretations of the section adopted virtually the same rule of reason which had been applied to the Sherman Act:

> Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. In *Standard Oil Co.* v. *FTC* (282 Fed. 81, 87), the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition or unduly obstructing the due course of trade.[1]

In 1950 (64 Stat. 1125) section 7 of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section, in addition to stock acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of that act, were not affected).

The 1950 amendment also eliminated from the statute the test, whether the effect of the acquisition might be to lessen competition between the acquiring and the acquired corporation.[2] In addition, the reference to lessening of competition "in any community" was eliminated, and the test was made whether competition might be lessened "in any line of commerce in any section of the country."

The effect of the 1950 amendment to section 7 was clearly expressed in a report entitled "Where the effect may be to substantially lessen competition or tend to create a monopoly," by Breck P. McAllister, in "An Antitrust Handbook," issued by the Section of Antitrust Law of the American Bar Association, (1958), at page 230.

> We leave section 7 with one concluding observation. The closing of the asset loophole is an important part of the 1950 amendment but of equal, if not greater significance is the change in the qualifying clause as to competitive effect. It is not too much to say that the decisions that read the rule of reason of the Sherman Act into this section stand disapproved by the Congress.[3]

The strict standards of the amended section 7 were applied by Judge Weinfeld in the Bethlehem-Youngstown case (*U.S.A.* v. *Bethlehem Steel Corp. et al*, (168 F. Supp. 576, U.S. District Court, Southern District of New York, 1958). In holding that the merger of Bethlehem

[1] *U.S.* v. *International Shoe Co.* (1930), 280 U.S. 291, 297–298; hearings on S. 1062, pp. 204–205.

[2] This provision was relied on by the Court of Appeals for the Third Circuit in holding that the Transamerica acquisitions did not violate sec. 7 of the Clayton Act (*Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 167–168).

[3] See also Report of the Attorney General's National Committee to Study the Antitrust Laws, Mar. 31, 1955, pp. 115–118.

and Youngstown would violate section 7, Judge Weinfeld stated his understanding of the effect of the statute as follows:

> * * * If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense. * * *
>
> The antitrust laws articulate the policy formulated by Congress. The significance and objectives of the Clayton Act and the 1950 amendment are well documented. In approving the policy embodied in these acts, Congress rejected the alleged advantages of size in favor of the preservation of a competitive system. The consideration to be accorded to benefits of one kind or another in one section or another of the country which may flow from a merger involving a substantial lessening of competition is a matter properly to be urged upon Congress. It is outside the province of the Court. The simple test under section 7 is whether or not the merger may substantially lessen competition "in any line of commerce in any section of the country."
>
> * * * * *
>
> Congress in seeking to halt the growing tendency to increased concentration of power in various industries was fully aware of the arguments in support of the supposed advantages of size and the claim of greater efficiency and lower cost to the ultimate consumer. It made no distinction between good mergers and bad mergers. It condemned all which came within the reach of the prohibition of section 7.[4]

National Bank Act

The National Bank Act (12 U.S.C. 33, Nov. 7, 1918) requires the advance approval of the Comptroller of the Currency before two or more national banks may consolidate, or before a State bank may consolidate with a national bank under the charter of the national bank, or before a national or State bank may merge into a national bank. The act sets forth no specific standards for the Comptroller to apply to such transactions.

Federal Reserve Act

Section 9 of the Federal Reserve Act (12 U.S.C. 321) authorizes the Board to approve or disapprove the establishment of branches of State member banks, under the same conditions as are provided for national banks. In considering such applications the Board is required to take into consideration the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of the Federal Reserve Act. Litigation is now underway in the U.S. District Court for the District of Columbia, in which the authority of the Board to take competitive factors into consideration under this section is at issue. (*Old Kent Bank and Trust Co.* v. *Martin et al* (U.S. District Court for the District of Columbia, Civil Action No. 1993–58.)

[4] 168 F. Supp. 576, 617–618; hearings on S. 1062, p. 213.

Federal Deposit Insurance Act

Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c), September 21, 1950) requires the advance approval of the Federal Deposit Insurance Corporation before an insured bank may (*a*) merge or consolidate with any noninsured bank, or (*b*) assume liability to pay any deposits in a noninsured bank, or (*c*) transfer assets to a noninsured bank in consideration of the assumption of liabilities for any portion of the deposits in the insured bank. Section 18(c) provides further that no insured bank may merge or consolidate with an insured State bank or assume liability to pay any deposits made in another insured bank, if the aggregate capital stock or aggregate surplus of all the banks participating in the transaction is decreased by reason of the transaction, unless prior written consent is given by (*a*) the Comptroller of the Currency if the assuming bank is to be a national bank or a district bank; (*b*) the Federal Reserve Board if the assuming or resulting bank is to be a State member bank; or (*c*) the Federal Deposit Insurance Corporation if the assuming or resulting bank is to be a nonmember insured State bank. No specific standards are set forth in the statute applicable to such transactions.

Bank Holding Company Act

Section 4(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841–48, May 9, 1946) requires the prior approval of the Federal Reserve Board for (1) a company to become a bank holding company by acquiring 25 percent of the voting shares of 2 or more banks; (2) a bank holding company to acquire ownership or control of more than 5 percent of the voting shares of a bank; (3) a bank holding company to acquire all or substantially all of the assets of a bank; or (4) any bank holding company to merge or consolidate with another bank holding company.

Section 3(c) of the act sets forth the factors the Board must consider to determine whether or not to approve any acquisition, merger, or consolidation. These factors are (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

In addition, section 3(d) of the act absolutely prohibits a bank holding company from acquiring the voting shares or assets of a bank located outside the home State of the holding company unless the laws of the State to be entered specifically authorize such acquisitions.

Section 11 of the act contains a savings clause which provides, in effect, that approval under the act would not constitute a defense to any proceedings based on any prohibited antitrust or monopolistic act, action, or conduct. The significance of this savings clause is shown in the suit instituted by the Department of Justice against

Firstamerica Corp. in the District Court of the Northern District of California, Southern Division, on March 30, 1959 (Civil Action No. 38139). This case involves both a stock acquisition and a bank merger alleged to be in violation of section 7 of the Clayton Act and section 2 of the Sherman Act.

THE NEED FOR REGULATION OF BANK MERGERS

The Federal banking agencies and the President have for a number of years recommended the enactment of legislation to permit the effective regulation of bank mergers. This committee has twice reported out and the Senate has twice passed bills which would have provided such regulation—S. 3911, 84th Congress, in 1956, and section 23 of title III of the financial institutions bill, S. 1451, 85th Congress, in 1957. The House did not pass these bills. In 1956, the House passed H.R. 5948, 84th Congress, which would have made different provisions for the regulation of bank mergers, but the Senate did not pass that bill.

The large numbers of mergers in recent years, the vast resources involved in these mergers, and the increases in the size of the largest banks, particularly those which have grown through mergers, all give rise to concern for the maintenance of vigorous competition in the banking system and in the industry and commerce served by the banking system. The reduction in the number of banks and the loss of competition between merged banks also give rise to concern. There are differing views about the effect and the significance of the mergers which have taken place. But there is general agreement that legislation providing for uniform and effective regulation of mergers is required for the future.

The testimony before the committee showed the extent to which these developments have gone. A review of this evidence demonstrates that there is cause for concern and need for legislation which which will provide a basis for effective regulation of bank mergers.

The following tables submitted by the FDIC show the changes in the numbers of banks and branches during the years 1934–58:

Number of banks, and analysis of changes in number of banks, United States (continental United States and other areas), 1934–58

Year	Number at end of year [1]	Net change	Began operations [2]	Ceased operations: Absorbed [3]	Ceased operations: Suspended or absorbed with FDIC aid [4]	Ceased operations: Other liquidations	Other additions to (+) or deletions from (−) count, net [5]
1958	14,060	−70	96	152	9	5	----------
1957	14,130	−78	87	161	2	3	+1
1956	14,208	−76	119	189	2	7	+3
1955	14,284	−125	116	231	5	5	----------
1954	14,409	−143	72	207	3	6	+1
1953	14,552	−65	65	115	2	10	−3
1952	14,617	−44	69	99	3	13	+2
1951	14,661	−32	63	78	5	13	+1
1950	14,693	−43	69	89	5	10	−8
1949	14,736	−17	72	76	8	12	+7
1948	14,753	−14	78	77	2	13	----------
1947	14,767	8	113	82	4	11	−8
1946	14,759	34	148	93	2	19	----------
1945	14,725	15	119	77	----------	27	----------
1944	14,710	−41	70	74	2	35	----------
1943	14,751	−102	48	82	5	63	----------
1942	14,853	−147	23	80	22	68	----------
1941	15,000	50	45	57	13	48	+123
1940	14,950	−135	42	76	42	52	−7
1939	15,085	−172	34	98	63	48	+3
1938	15,257	−187	37	85	78	61	----------
1937	15,444	−270	58	175	78	81	+6
1936	15,714	−226	59	160	65	67	+7
1935	15,940	15	184	171	34	93	+129
1934	15,925	----------	----------	----------	----------	----------	----------

[1] As shown in annual reports for the indicated years, with the following exceptions: 1941 as revised and shown in the annual report for 1942, p. 68; 1935 as revised and shown in the annual report for 1936, p. 100; 1934 as revised and shown in the annual report for 1935, p. 35 and p. 48.

[2] Mostly new banks, but includes a few previously operating financial institutions which became banks of deposit.

[3] Net decrease as a consequence of absorptions, consolidations, and mergers (excluding cases involving financial aid by the FDIC).

[4] Includes insured and noninsured banks suspended and neither succeeded nor reopened, plus the net decrease in number of insured banks attributable to absorptions facilitated by FDIC aid.

[5] Includes revisions in classification and changes discovered in years subsequent to their occurrence.

Source: Annual reports of the Federal Deposit Insurance Corporation, 1935–57, and unpublished data for 1958.

(Hearings on S. 1062, p. 56.)

Number of branches, and analysis of changes in the number of branches, United States (continental United States and other areas), 1934–58

Year	Number at end of year [1]	Net increase	Opened for business		Discontinued, total [3]	Other additions to (+) or deletions from (−) count, net [4]
			Succeeded absorbed banks	Other new branches [2]		
1958	9,498	716	135	615	36	+2
1957	8,777	671	145	555	33	+4
1956	8,106	715	168	582	39	+4
1955	7,391	640	206	483	50	+1
1954	6,751	524	181	378	37	+2
1953	6,227	394	97	323	29	+3
1952	5,833	339	84	278	21	−2
1951	5,494	336	59	298	24	+3
1950	5,158	294	73	231	22	+12
1949	4,864	251	61	196	8	+2
1948	4,613	205	59	162	20	+4
1947	4,408	188	55	165	31	−1
1946	4,220	52	55	171	174	----------
1945	4,168	27	40	133	146	----------
1944	4,141	141	36	138	33	----------
1943	4,000	187	23	212	48	----------
1942	3,813	44	28	68	52	----------
1941	3,769	41	19	59	39	+2
1940	3,728	35	41	51	57	----------
1939	3,693	45	48	52	55	----------
1938	3,648	42	43	51	52	----------
1937	3,606	117	90	94	69	+2
1936	3,489	117	73	100	56	----------
1935	3,372	181	87	138	86	+42
1934	3,191	----------	----------	----------	----------	----------

[1] Data as published in indicated annual reports, with the following exceptions: 1941 as revised and shown in the annual report for 1942, p. 69; 1935 as revised and shown in the annual report for 1936, p. 100; 1934 as revised and shown in the annual report for 1935, p. 35 and p. 146.

[2] Includes a small number of branches replacing banks relocated or placed in liquidation or receivership and facilities established in or near military or other Federal Government installations.

[3] Includes facilities discontinued at military or other Federal Government installations.

[4] Includes revisions in classification and changes discovered in years subsequent to their occurrence.

Source: Annual reports of the Federal Deposit Insurance Corporation, 1935–57, and unpublished data for 1958.

(Hearings on S. 1062, p. 57.)

The Comptroller of the Currency gave a full list of all the mergers, consolidations, and purchase and sale transactions during the years 1950–58 (hearings on S. 1062, pp. 139–180). These were summarized by him as follows:

Summary of consolidations, mergers, and purchase and sale transactions, by years

Year	Approved by Comptroller of the Currency		Approved by State banking departments	
	Number of banks	Total resources of absorbed banks	Number of banks	Total resources of absorbed banks
1950	52	$576,464,143	39	$552,435,446
1951	30	384,389,647	54	1,393,302,452
1952	59	517,662,108	40	302,468,222
1953	67	523,680,925	48	676,103,752
1954	126	2,058,262,234	90	2,006,310,444
1955	126	2,015,225,452	99	7,600,107,754
1956	105	2,380,816,965	81	582,992,639
1957	83	1,142,448,371	82	1,159,307,694
1958	83	1,704,645,259	68	854,336,649
Total	731	11,303,595,104	601	15,127,365,052

(Hearings on S. 1062, p. 138.)

The growth in deposits of various groups of banks during the period from 1935 through 1958 are shown in the following table:

Comparison of largest banks' deposit totals, by groups, as of Dec. 31, 1958, compared with previous year ends

	Dec. 31, 1958	Dec. 31, 1957	Dec. 31, 1955	Dec. 31, 1950	Dec. 31, 1945	Dec. 31, 1940	Dec. 31, 1935
U.S. commercial banks:							
10 largest	$44,900,743,905	$41,777,804,125	$40,129,075,073	$31,023,166,225	$32,331,455,429	$17,738,460,000	$11,224,042,000
25 largest	65,002,736,409	61,678,565,867	58,273,326,793	46,498,210,329	47,402,457,137	26,250,757,000	17,103,308,000
50 largest	81,779,717,754	77,183,260,968	73,470,909,032	58,403,706,937	59,418,883,073	31,630,269,000	20,964,269,000
100 largest	101,089,614,759	94,000,567,064	90,497,691,295	71,690,174,749	72,537,646,042	37,637,222,000	25,101,857,000
200 largest	121,009,309,655	112,001,040,267	108,049,273,932	85,195,202,521	85,490,277,317	42,840,309,000	28,704,848,000
300 largest	132,037,555,535	122,037,225,544	117,603,897,614	98,082,342,968	92,977,080,259	45,667,835,000	30,691,143,000
1,000 largest	161,823,193,965	140,937,489,830	143,598,094,651	114,489,808,914	112,813,448,282		
Banks over $10 million	183,310,166,585	169,038,753,946	160,166,614,301	124,269,368,001	120,312,000,000		
Banks under $10 million	[1] 34,000,000,000	33,444,612,000	33,038,225,000	31,879,453,400	30,863,553,000		
All commercial	[1] 217,300,000,000	202,483,366,000	193,204,839,000	156,088,822,000	151,175,553,000	65,749,598,000	45,368,000,000
Mutual savings	[1] 34,100,000,000	31,694,726,000	28,186,734,000	20,031,336,000	15,354,540,000	10,658,282,000	9,871,000,000
All U.S. banks	[1] 251,400,000,000	234,178,092,000	221,391,572,000	176,120,158,000	166,530,093,000	76,407,886,000	55,239,000,000
Number of banks	14,020	14,080	14,284	14,466	14,598	14,956	16,075
Under $10 million	11,055	11,243	11,578	12,183	12,459		
Over $10 million	2,447	2,314	2,179	1,754	1,597		
Mutual savings banks	518	523	527	529	542	551	578

[1] Estimated for Dec. 31, 1958. Previous years' totals from Comptroller of the currency and FDIC.

Source: American Banker, Mar. 15, 1959.

The percentages of the total deposits held by some of these groups of banks were shown in a chart on page 124 of the hearings, from which the following are taken:

	1940	1945	1950	1955	1957	1958
100 largest banks	49.3	43.6	40.7	40.9	40.1	40.2
300 largest banks	59.8	55.8	52.8	53.1	52.1	52.6
1,000 largest banks	([1])	67.7	65.0	64.8	64.0	64.5

[1] Not available.

The deposits, capital, and surplus and undivided profits of the 50 largest banks in the United States, on December 31, 1958, are shown in the following table, taken from the list of 100 largest banks in the American Banker of January 30, 1959:

The 50 largest banks in the United States listed in order of amount of deposits on Dec. 31, 1958

[Exclusive of mutual savings banks]

Position, Dec. 31, 1958		Deposits, Dec. 31, 1958	Rank 1957	Capital, Dec. 31, 1958	Surplus and undivided profits, Dec. 31, 1958
1	Bank of America National Trust & Savings Association, San Francisco	$10,307,560,993	1	$160,000,000	$447,536,823
2	Chase Manhattan Bank, New York	7,386,096,807	2	163,625,000	467,783,465
3	First National City Bank, New York	7,009,693,334	3	240,000,0C0	473,179,286
4	Manufacturers Trust Co., New York	3,257,855,823	4	50,390,000	171,113,502
5	Chemical Corn Exchange Bank, New York	3,174,002,554	5	63,765,900	232,071,860
6	Security-First National Bank, Los Angeles	3,087,330,013	6	73,500,000	149,291,578
7	Bankers Trust Co., New York	2,779,132,981	8	40,299,500	227,962,118
8	First National Bank, Chicago	2,705,882,294	7	125,000,000	136,958,478
9	Guaranty Trust Co., New York	2,638,018,353	9	120,000,00C	298,876,623
10	Continental Illinois National Bank & Trust Co., Chicago	2,555,170,750	10	100,000,000	161,277,613
11	Mellon National Bank & Trust Co., Pittsburgh	1,834,248,797	12	62,704,500	214,893,143
12	Irving Trust Co., New York	1,774,870,208	13	51,000,000	86,094,372
13	National Bank of Detroit	1,766,260,560	11	28,974,000	119,007,682
14	Hanover Bank, New York	1,713,003,349	14	40,000,000	132,014,721
15	American Trust Co., San Francisco	1,673,330,430	16	27,812,500	88,824,337
16	First National Bank, Boston	1,652,889,227	15	35,000,000	129,766,915
17	Crocker-Anglo National Bank, San Francisco	1,526,989,170	17	50,416,250	67,417,145
18	Cleveland Trust Co., Cleveland	1,348,255,894	18	20,000,000	87,206,368
19	California Bank, Los Angeles	1,111,863,824	20	19,430,963	48,754,203
20	First Pennsylvania Bank & Trust Co., Philadelphia	1,060,983,999	19	22,308,000	68,867,572
21	Philadelphia, Pa., National Bank	994,955,654	21	26,478,125	62,368,128
22	First Western Bank & Trust Co., San Francisco	972,306,152	23	27,674,275	42,290,168
23	New York Trust Co., New York	891,732,353	28	30,000,000	54,849,211
24	Republic National Bank, Dallas	886,140,654	29	37,866,576	63,238,984
25	First National Bank in Dallas	885,162,233	31	23,100,000	34,824,495
26	Seattle-First National Bank	882,470,188	24	20,000,000	50,844,070
27	Detroit Bank & Trust Co., Detroit	868,916,313	22	18,378,50C	52,096,214
28	J. P. Morgan & Co. Inc., New York	857,868,671	26	35,000,000	53,050,836
29	First National Bank, Portland	849,167,094	25	20,000,000	51,051,499
30	United States National Bank, Portland	829,029,904	27	20,000,000	46,180,974
31	Harris Trust & Savings Bank, Chicago	749,846,200	33	15,000,000	34,450,647
32	National City Bank, Cleveland	732,642,784	32	17,600,000	43,529,663
33	Manufacturers National Bank, Detroit	727,282,537	3C	12,528,500	40,026,034
34	First Wisconsin National Bank, Milwaukee	716,973,381	37	10,000,000	32,927,839
35	First City National Bank, Houston	708,031,012	36	25,000,000	29,558,558
36	Northern Trust Co., Chicago	703,363,776	34	10,000,000	25,283,254
37	Marine Trust Co. of Western New York, Buffalo	685,457,373	35	17,700,000	34,004,089

The 50 largest banks in the United States listed in order of amount of deposits on Dec. 31, 1958—Continued

Position, Dec. 31, 1958		Deposits, Dec. 31, 1958	Rank 1957	Capital, Dec. 31, 1958	Surplus and undivided profits, Dec. 31, 1958
38	Girard Trust Corn Exchange Bank, Philadelphia	$685, 208, 898	39	$16, 918, 750	$54, 125, 674
39	Wells Fargo Bank, San Francisco	647, 096, 255	40	11, 000, 000	29, 639, 819
40	First National Bank, St. Louis	587, 223, 204	38	15, 400, 000	33, 703, 771
41	Mercantile Trust Co., St. Louis	586, 875, 987	41	22, 687, 500	33, 999, 388
42	Marine Midland Trust Co., New York	584, 406, 945	43	12, 500, 000	42, 722, 526
43	Bank of California NA, San Francisco	573, 856, 874	45	12, 846, 500	28, 222, 365
44	Franklin National Bank of Long Island, Franklin Square, New York	569, 774, 247	50	14, 302, 000	21, 272, 191
45	Peoples First National Bank & Trust Co., Pittsburgh	559, 003, 843	42	16, 320, 000	31, 958, 036
46	Wachovia Bank & Trust Co., Winston-Salem	557, 413, 082	47	18, 930, 000	23, 015, 028
47	Central National Bank, Cleveland	555, 639, 556	44	16, 400, 000	23, 762, 285
48	Bank of New York, N.Y	543, 484, 450	46	27, 000, 000	26, 224, 258
49	National Bank of Commerce, Seattle	510, 478, 517	48	8, 000, 000	25, 089, 672
50	Citizens National Trust & Savings Bank, Los Angeles	504, 870, 254	51	7, 000, 000	23, 602, 899

During the years from 1935 to 1957 the competition faced by commercial banks from other financial institutions increased sharply. The FDIC submitted a table which shows the increases in some of these institutions:

Number and assets of credit unions, life insurance companies, and savings and loan associations, selected years, 1935–57

[Amounts in millions of dollars]

Year end	Credit unions [1]		Life insurance companies [2]		Savings and loan associations [3]	
	Number	Assets	Number	Assets	Number [4]	Assets
1957	18, 070	$3, 999	811	$101, 512	6, 200	$48, 200
1956	17, 113	3, 271	748	96, 306	6, 136	42, 875
1955	16, 064	2, 743	623	90, 636	6, 071	37, 719
1950	10, 569	1, 005	440	64, 020	5, 992	16, 893
1945	8, 615	435	348	44, 797	6, 149	8, 747
1940	8, 914	253	305	30, 802	7, 521	5, 733
1935	2, 000	50	340	23, 217	10, 266	5, 875

[1] Source: "Statistical Abstract of the United States," 1958, p. 462; 1950, p. 417; for 1957, from Bureau of Federal Credit Unions.
[2] Source: "Statistical Abstract of the United States," 1958, p. 476. Data for 1957 furnished by Bureau of the Census, U.S. Department of Commerce.
[3] Source: For 1935, "Statistical Abstract of the United States, 1950," p. 407; for 1940–56, "Statistical Abstract of the United States," 1958, p. 460; for 1957, "Savings and Loan Fact Book," 1958, p. 44.
[4] Complete data on number of branches of all savings and loan associations at dates shown above are not available. For 1957 a Federal Savings and Loan Insurance Corporation tabulation shows 915 branch office of associations members of the Federal Home Loan Bank System.

(Hearings on S. 1062, p. 56.)

In the light of the information set forth above, there is no justification for continuance of the present incomplete and confusing statutory provisions dealing with bank mergers. On the contrary, it is essential to provide immediately for effective and uniform regulation of bank mergers, under standards appropriate to the industry.

PRESENT LAWS DO NOT EFFECTIVELY RESTRICT MERGERS

The hearings disclosed evidence that many mergers are now proceeding without effective restriction or control. The Comptroller of the Currency supplied a list of cases where the continuing bank was a State bank member of the Federal Reserve System, showing which cases were subject to review and which were not. The following is a summary:

State Bank Member of Federal Reserve System, the Continuing Bank

Approval of Board of Governors of Federal Reserve System not required because the total capital stock or surplus of the resulting or assuming bank was not less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or all of the parties to the assumption of liabilities.

Recapitulation

Year	Requiring Board approval	Not requiring Board approval	Total	Total resources cases not requiring Board's approval
1955	38	30	68	$6,431,058,718
1956	30	24	54	214,314,262
1957	21	20	41	276,574,435
1958	21	23	44	523,258,530
Total	110	97	207	7,445,205,925

(Hearings on S. 1062, p. 127.)

Of the banks absorbed by these mergers, 34 had formerly been national banks, including the Chase National Bank, the First National Bank of Philadelphia, and the Second National Bank of Boston.

The Comptroller also listed cases where the continuing bank was a State nonmember bank insured by FDIC, showing where the FDIC did and did not review the merger. The following is a summary:

State Bank Insured by Federal Deposit Insurance Corporation, but Not a Member of Federal Reserve System, the Continuing Bank

Approval of Federal Deposit Insurance Corporation not required because the total capital stock or surplus of the resulting or assuming bank was not less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or all of the parties to the assumption of liabilities.

Recapitulation

Year	Requiring FDIC approval	Not requiring FDIC approval	Total	Total resources cases not requiring FDIC approval
1955	25	9	34	$28,592,419
1956	16	11	27	30,472,858
1957	14	21	35	286,765,741
1958	18	8	26	92,336,858
Total	73	49	122	438,167,876

(Hearings on S. 1062, p. 132.)

The banks absorbed by these mergers included 10 national banks.

The Comptroller gave the following summary of the cases where the continuing bank was a national bank:

NATIONAL BANK, THE CONTINUING BANK

Approval of Comptroller of the Currency not required to assumption of liabilities cases only because the capital stock or surplus of the assuming national bank was not less than the aggregate capital stock or aggregate surplus, respectively, of all the parties to the assumption of liabilities. (Comptroller of the Currency required to approve or disapprove all consolidations or mergers where the continuing bank is a national bank under the provisions of specific statutes.)

Recapitulation

Year	Consolidations and mergers requiring Comptroller's approval	Assumption cases		Total	Total resources cases not requiring Comptroller's approval
		Requiring Comptroller's approval	Not requiring Comptroller's approval		
1955	73	51	2	126	$13,490,703
1956	69	32	4	105	36,950,783
1957	62	20	1	83	1,285,741
1958	53	[1] 30		83	
Total	257	133	7	397	51,727,227

[1] Includes 2 District of Columbia nonnational banks.

(Hearing on S. 1062, p. 136.)

The Comptroller testified that in the 4 years, 1955 to 1958, inclusive, he had turned down 30 applications, formal or informal, for mergers or consolidations, of which 22 were based on competitive factors. At first glance this may seem a small number of denials, compared to the 397 mergers, consolidations, and assumptions he approved in the same 4 years. But the Comptroller is under pressure from two directions. In the first place, he may well have been reluctant to press the issue of competitive factors in close cases, because the statute under which he is operating (12 U.S.C. 33) contains no explicit reference to competitive factors.[5] In the second place, a refusal by him to approve a merger may merely result in the surrender of the national bank charter, and reincorporation as a State bank. The Comptroller had no authority to prevent, or even to review, the 44 mergers during 1955–58 in which national banks were merged into State banks, including such major institutions as the former Chase National Bank of New York, the former First National Bank of Philadelphia, and the former Second National Bank of Boston.

Under such circumstances, it is difficult to expect the Comptroller to take a strong stand against mergers.

[5] The refusal of the Federal Reserve Board, on the ground of competitive factors, to approve the establishment, as new branches of an absorbing bank, of certain former branches of an absorbed bank, following upon a merger which the Board had no authority to review, is being attacked in the Old Kent case by the bank involved and by the National Association of State Bank Supervisors, on the ground that the Board has no statutory authority to consider competitive factors in reviewing applications for the establishment of new branches (*Old Kent Bank and Trust Co.* v. *Martin, et al*, U.S. Dist Ct., D.C., civil action No. 1993–58). See also *Dauphin Deposit Trust Company* v. *Myers* (Pa. 1957), 130 A. 2d 686, where a denial by the Pennsylvania authorities of an application for authority to merge was reversed by the courts, in part on the basis of the absence of specific statutory standards (hearings on S. 1062, p. 43).

The Federal Reserve Board and the FDIC reviewed only 55 percent of the mergers and consolidations which took place in banks under their jurisdiction during the years 1955–58 The cases not subject to their control included the 44 cases where national banks were absorbed into State banks. Under section 18(c) of the Federal Deposit Insurance Act approval of a merger by the Board or the FDIC is required if the capital stock or surplus of the resulting bank will be less than the aggregate capital stock or aggregate surplus respectively of all the merging or consolidating banks. Except where the merger is required by the unsatisfactory condition of one of the merging banks, the absorbing bank would ordinarily be able to provide for as high capital stock and surplus as those of the merging or consolidating banks. This would mean that in most cases the absorbing bank would have it in its own power to prevent the Board or the FDIC from reviewing the merger.

BANKING IS VESTED WITH A PUBLIC INTEREST AND MUST BE REGULATED LIKE PUBLIC UTILITIES AND MONOPOLIES

Banks are an integral and essential part of the Nation's fiscal and monetary system. The Government has a vital interest in the Nation's banks as suppliers of funds, as depositories, and as fiscal agents. Commerce, industry, and private citizens have a vital interest in banks as a source of credit needed for development and growth. Depositors have a vital interest in the safety of their deposits.

Vigorous competition between strong, aggressive, and sound banks is highly desirable; lack of competition, restraints on competition, and monopolistic practices are undesirable. Competition in banking takes many forms—competition for deposits by individuals and corporations and by personal and business depositors; competition for individual, business, and Governmental loans; competition for services of various sorts. Competition for deposits increases the amounts available for loans for the development and growth of the Nation's industry and commerce. Competition for loans gives the borrowers better terms and better service and furthers the development of industry and commerce. Vigorous competition in banking stimulates competition in the entire economy, in industry, commerce, and trade. There is no question that competition is desirable in banking, and that competitive factors should be considered in all aspects of the supervision and regulation of banks.

But it is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest.

Ever since the days of the first and second Banks of the United States and *McCulloch* v. *Maryland* (4 Wheat. 316, 1819), it has been generally accepted that banking is a field subject to special regulation by virtue of its effect upon and relation to the fiscal and monetary policies of the Federal Government under article I, section 8, of the Constitution of the United States.

This Federal control over banking long antedated the antitrust laws. The first and second Banks of the United States, the National Bank Act of 1864, and the related tax on notes issued by State banks represented early efforts in the field. The Federal Reserve Act of 1913,

the banking legislation of the 1930's, and the Bank Holding Company Act of 1956 are more recent reflections of the Federal interest and concern.

Time and again the Nation has suffered from the results of unregulated and uncontrolled competition in the field of banking, and from insufficiently regulated competition. Rapidly depreciating State and Continental paper money was an important factor in the adoption of the Constitution. After the termination of the first Bank of the United States, excessive State bank note issues, among other causes, led in 1814 to the suspension of specie payments by all the State banks in the country except those in New England. Wildcat banks and uncontrolled note issuance played a large part in bringing about the panic of 1837 and the panic of 1857. The rapid increase in the number of small weak banks, to such a large number that the Comptroller could not effectively supervise them or control any but the worst abuses, was one of the factors which led to the panic of 1907.

The banking collapse in the early 1930's again was in large part the result of insufficient regulation and control of banks, in effect the result of too much competition.

> * * * the reform legislation of 1913, while removing many of the defects of the banking system as a system, *did very little to strengthen the individual commercial bank*. * * * The country continued to be served or disserved by thousands of small, weak, independent banks having inadequate capital, incapable executives, and poor outside connections.
>
> * * * the banking collapse did not begin in 1931, but was really under way throughout the period of the 1920's. During that decade * * * thousands of banks failed, but the appalling weakness of the banking structure was not immediately realized, because most of the failures occurred in isolated agricultural communities.[6]

The following tables of bank suspensions from 1921 to 1936, and from 1946 to 1958, show the weakness of the banking system of the 1920's and the comparative strength of the system now.

Bank suspensions in the United States, 1921–36 [1]

Year	All banks	National banks	State member banks	State nonmember banks	Total deposits (thousands of dollars)
1921	505	52	19	434	172, 188
1922	366	49	13	304	91, 182
1923	646	90	32	524	149, 601
1924	775	122	38	615	210, 151
1925	618	118	28	472	167, 555
1926	976	123	35	818	260, 378
1927	669	91	31	547	199, 329
1928	498	57	16	425	142, 386
1929	659	64	17	578	230, 643
1930	1, 350	161	27	1, 162	837, 096
1931	2, 293	409	107	1, 777	1, 690, 232
1932	1, 453	276	55	1, 122	706, 188
1933	4, 000	1, 101	174	2, 725	3, 596, 698
1934	57	1	0	56	36, 937
1935	34	4	0	30	10, 015
1936	44	1	0	43	11, 306

[1] Including private banks but excluding mutual savings banks.

Source: Federal Reserve Bulletin, September 1937, pp. 868–873.

[6] "Money and Banking," Raymond P. Kent, New York, 1947, pp. 303–304.

Commercial bank suspensions because of financial difficulties, U.S. and other areas, 1946 through 1958 [1]

Year	All banks	National banks	State member banks	Insured nonmember banks	Noninsured nonmember banks	Deposits (thousands of dollars)
1946	2			1	1	494
1947	6	3		2	1	7,207
1948	3	1	2			10,674
1949	9	2		3	4	9,108
1950	5	2		2	1	5,543
1951	5	1		1	3	6,097
1952	4			3	1	3,313
1953	5		1	3	1	45,101
1954	4			2	2	2,947
1955	5	2		3		11,968
1956	3	1		1	1	11,644
1957	3	1	1		1	12,502
1958	9	1		3	5	10,412
Total	63	14	4	24	21	137,010

[1] Includes private banks but excludes mutual savings banks. Includes insured banks placed in receivership or insured banks with deposits assumed by another insured bank with the financial aid of the Federal Deposit Insurance Corporation, and 3 insured bank suspensions that reopened or merged without financial aid of the Federal Deposit Insurance Corporation.

Source: Federal Deposit Insurance Corporation.

The decline in the total number of banks from approximately 31,000 in 1921 to the present level of just over 14,000 must be viewed in the light of the contrast between suspensions in the 1920's and early 1930's, and recent suspensions.

It was in the light of this background that section 6 of the Federal Deposit Insurance Act was written, requiring consideration of the following factors before granting insurance to a bank: the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the communities to be served by the bank, and whether or not its corporate powers are consistent with the purposes of the act.

The basis for handling banking through banking laws, specially framed to fit the particular needs of the field, instead of relying on unrestricted competition and the antitrust laws, is set forth in "Banking Under the Antitrust Laws," by A. A. Berle (49 Columbia Law Review (1949) 589, at p. 592):

> Operations in deposit banking not only affect the commercial field, but also determine in great measure the supply of credit, the volume of money, the value of the dollar, and even, perhaps, the stability of the currency system. Within this area considerations differing from and far more powerful than mere preservation of competition may be operating under direct sanction of law. It is the theory, in ordinary commercial fields, that competition is the desirable check on price levels—the process by which the efficient are rewarded by survival, and the inefficient eliminated by failure. The price of business failures is not regarded as too high for the community to pay in view of advantages to consumers, stimulus toward greater efficiency, and freedom of enterprise. But it is doubtful (to say the least) whether any such assumption is indulged in with respect to deposit banks; certainly the theory is not there accepted to the full extent of its logic.

A bank failure is a community disaster, however, wherever, and whenever it occurs. While competition may be desirable up to a point in deposit banking, there is a clear bottom limit to its desirability. So long as 90 percent of the monetary needs of the country are supplied through bank credit, deposits, and checks, under a system which contemplates many thousands of banks and also a uniform, smooth, free flow of bank checks, a high degree of cooperation among banks is essential. So long as certain kinds of banking paper are accepted as a basis for currency through the operations of the Federal Reserve rediscount, a high factor of uniformity is needed. The economic and social premises of the Sherman Act in respect of other businesses are not fully accepted by the Congress, the States, or the public as the only considerations applicable to deposit banking.

A BALANCED JUDGMENT REQUIRED

In considering what standards to provide for the reviewing banking agencies, the committee had before it the banking factors set forth in section 6 of the Federal Deposit Insurance Act, the differing antitrust standards of the Sherman Act and the Clayton Act, and also special provisions for regulated public utilities exempted from the antitrust laws, such as those covered by the Interstate Commerce Act.

The committee concluded that reference to the banking factors in section 6 of the Federal Deposit Insurance Act, while essential, would not alone suffice, because the section 6 standards do not give sufficient weight to the factor of competition.

The committee concluded, on the other hand, that imposing the strict rule of section 7 of the Clayton Act, as amended in 1950, as interpreted in the *Bethlehem-Youngstown* case, would give absolute and controlling weight to the lessening of competition, regardless of other factors. The committee did not consider that it would be in the public interest to regulate bank mergers under standards which would mean that the demonstrable benefits of a merger are irrelevant and outside the province of the administrator, and which would make no distinction between good mergers and bad mergers.

A number of examples were cited to the committee where the public interest would clearly require that a proposed merger should be approved even though a definite and substantial lessening of competition could be expected:

The representative of the American Bankers Association testified as follows:

> Moreover, there are certain circumstances in which bank mergers may substantially lessen competition and yet be desirable in the interest of the public and sound banking, such as the following practical examples:
>
> 1. Where there is a reasonable probability of the ultimate failure of the bank to be acquired.
>
> 2. Where because of inadequate management the acquired bank's future prospects are unfavorable.
>
> 3. Where the acquired bank is a problem bank with inadequate capital or unsound assets and its acquisition by

another bank would be the best practical means of dealing with the problem.

4. Where the acquired bank has no adequate provision for management succession or its management is incompetent.

5. Where the acquired bank is an uneconomic unit or is too small to meet the needs of its community by providing loans of sufficient size or by providing needed banking facilities.

6. Where several banks in a small town are compelled by an overbanked situation to resort to unsound competitive practices which may eventually have an adverse effect upon the condition of such banks and the merger of the two or more banks would, therefore, be in the public interest.

(Hearings on S. 1062, p. 72.)

Representative Celler testified:

> In addition to the acquisition of a bank which otherwise would be faced with a possibility of failure, there are other circumstances in which, from a banking standpoint, the acquisition of a bank by another bank may be in the public interest. For example, where the acquisition is the most practicable means of dealing with a problem bank having inadequate capital or unsound assets or where the acquired bank has not adequate provision for management succession. Also, where several banks in a small town are compelled by an overbanked situation to resort to unsound competitive practices which may eventually have an adverse effect upon the condition of the banks, the merger of two or more of the banks may well be in the public interest The same principle applies where there are not adequate banking facilities. These various situations are illustrative of the circumstances where the consummation of the transaction would not be contrary to the public interest * * * . * * *

(Hearings on S. 1062, pp. 98-99.)

The committee agreed that in the situations described by the witnesses, and in similar situations, approval of the merger would be in the public interest, even though this would result in a substantial lessening of competition. In cases such as these the benefits would be demonstrable, the merger would be a "good merger," and approval should be granted in spite of the lessening of competition.

Since there was widespread agreement that some mergers were in the public interest and should be approved, even though they might result in a substantial lessening of competition, the committee concluded that the strict rule of the 1950 amendment of section 7 of the Clayton Act was inappropriate to the field of banking.

To adopt this rule for bank mergers might result in the disapproval of bank mergers which all would agree were in the public interest; it might, on the other hand, as the result of the legislative history of the new provisions for banking, bring about a relaxed and modified interpretation of section 7, which would be inappropriate in the case of ordinary unregulated industrial and commercial concerns where

unrestricted competition is in the public interest. Either of these results would be undesirable. The committee, therefore, concluded that it was preferable to handle bank mergers under rules specially designed for the banking industry.

The committee concluded that the balanced approach set forth in S. 1062 was the most appropriate for the banking industry. The committee noted the close resemblance to the test provided in section 5 of the Interstate Commerce Act, and further noted that that section provides an exemption from the Sherman Act as well as the Clayton Act, a provision not contained in S. 1062.

S. 1062 provides for full consideration of the public interest in the soundness and good management of the banking system, through recognition of the several banking factors of section 6 of the Federal Deposit Insurance Act, and equally full consideration of the public interest in promoting competition and preventing monopoly. S. 1062 gives no one of these factors controlling weight, but requires that all be considered, that all be duly weighed, and that a balanced judgment be reached by the banking agency on the basis of all these factors.

EXPLANATION OF S. 1062

Applicability

S. 1062 would apply to all bank mergers involving a bank insured by FDIC—national banks, State member banks, and insured nonmember banks. This would cover the vast majority of American banks.

Number and deposits of operating banks in United States and other areas, Dec. 31, 1958

	Number of banks	Deposits, Dec. 31, 1958 (millions)
All banks (United States and other areas)	14,060	$251,332
Insured by FDIC	13,365	242,445
Not insured by FDIC	695	8,886
Commercial banks and trust companies	13,540	217,291
Banks insured by FDIC	13,124	215,169
National banks	4,578	116,714
State member banks	1,730	66,075
Nonmember banks	6,816	32,379
Banks not insured by FDIC	416	2,123
Mutual savings banks	520	34,040
Insured by FDIC	241	27,277
Not insured by FDIC	279	6,764

Source: Federal Deposit Insurance Corporation.

Regulatory agencies

The committee is convinced that there is need for uniform regulation of bank mergers, consolidations, and other asset-acquisition transactions involving banks insured by the Federal Deposit Insurance Corporation. The proposed legislation would achieve this by placing the administration of this law in the hands of the Federal banking supervisory agencies. This bill follows the traditional structure of statutes enacted by the Congress in the regulation of other aspects of the banking industry.

The bill amends section 18(c) of the Federal Deposit Insurance Act by deleting the present authority, which requires the advance approval of the three Federal supervisory agencies only in those mergers, consolidations, and assumption transactions where there is a diminution of capital, and by substituting a new set of standards. Every insured bank would be required to receive advance approval before it could acquire the assets of another bank by merger, consolidation, or absorption through the purchase of assets and the concurrent assumption of deposit liabilities. The advance approval feature is important in halting bank acquisitions before they are consummated and in preserving the depositors' confidence in an institution which might otherwise be destroyed by an attempt to unscramble assets after an acquisition has been completed.

The authority to grant consent to bank acquisitions would be divided along traditional lines between the three Federal banking agencies. Thus, prior written consent would be required from the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a National bank or a District bank; the Federal Reserve Board if the acquiring, assuming, or resulting bank is to be a State member bank of the Federal Reserve System; or the Federal Deposit Insurance Corporation if the acquiring, assuming, or resulting bank is a State bank that is not a member of the Federal Reserve System but is insured by the FDIC. Consequently, the responsibility for carrying out the statute would be vested in the Comptroller for the 4,578 National banks, in the Board for the 1,730 State member banks, and in the FDIC for the 7,057 nonmember insured State banks.

Standards to be applied

In passing on applications for mergers, the agency is to take into consideration both the banking factors and the competitive factors which may be involved in the merger. No one of the banking factors alone will be of controlling weight, and no one of the competitive factors alone will be of controlling weight. All must be considered and weighed together by the banking agency involved before it can reach its decision on the application.

The bill would require that these three Federal agencies consider the banking factors enumerated in section 6 of the Federal Deposit Insurance Act. These are the usual banking factors which these three regulatory agencies are accustomed to review and consider. They include the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of the act. This requirement will insure that due weight is given to the banking aspects of each asset acquisition.

The three Federal banking agencies would also be required to consider whether the effect of the proposed merger "may be to lessen competition unduly or to tend unduly to create a monopoly." These factors must be weighed along with the various banking factors also involved in the particular merger.

The word "unduly" is used in the bill to make clear the intention that the effect of any lessening of competition or tendency to monopoly which may be found by the agency should not be used as a controlling

or determinative factor in and of itself. The word "unduly" is used to show that any lessening of competition or tendency to monopoly which may be found by the agency—whether "appreciable," "perceptible," "slight," "substantial," "serious," or "great"—must be weighed and considered by the banking agency as just one of the several factors which will go to form its balanced judgment, on the basis of all of the factors involved.

The decision in most cases can be expected to be clear. In many cases the proposed merger will not reduce competition at all and there will be sound and convincing banking reasons for authorizing the merger. In other cases the proposed merger will clearly increase and strengthen competition, and there will be no banking factors which might lead to rejection of the merger. In still other cases, there will be serious danger of very considerable reduction in competition, and few or no sound banking reasons to approve the merger. In any of these cases, there need be little hesitation in approving or denying the application.

The committee recognizes that in a relatively small number of cases the balancing of the various factors will be difficult—some banking factors may be favorable, some may be unfavorable; some competitive factors may be favorable, others unfavorable.

In such cases, the decision will not be simple. Full consideration will have to be given to the basic purposes of the statute: to promote a sound banking system, in the interest of the Government, borrowers, depositors, and the public; and to promote competition as an indispensable element in a sound banking system.

Consultation with other banking agencies

S. 1062 requires, in the interest of uniform standards, that the Federal banking agency having jurisdiction over the merger in question obtain the views of the two other banking agencies in every case, as to whether the effect of the proposed merger may be to lessen competition unduly or to tend unduly to create a monopoly.

The committee considers this provision essential to the maintenance of the dual system of banking. The Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation must review applications with the same attitude, and must give the same weight to the various banking and competitive factors. The Comptroller must not be more lenient in approving mergers, so as to attract merging State banks into the national banking system. The Board and the FDIC likewise must not be more lenient in approving mergers, so as to tempt national banks to leave the national bank system. The State banking system and the National banking system must develop and compete with each other on their own merits, without pressure in either direction from the administration of S. 1062.

Reports from the Attorney General

The committee amendment requiring reports from the Attorney General on the competitive factors involved in the merger in all but certain emergency cases is considered an important part of the statute. This provision is a significant change from the optional consultation provided in earlier bills.

This provision was inserted because of the Attorney General's statutory responsibility for the overall enforcement of the antitrust laws.

The experience of the Department of Justice in the field of antitrus law has been accumulated over almost 75 years of investigation an litigation. While much of this information and experience lies out side of the specialized field of banking, some of it may nevertheless b of value to the banking agencies.

The Attorney General is required to give a report on the competitiv factors involved in the proposed merger. Under S. 1062 the com petitive factors involved in the merger are only one element of severa to be considered in passing on the application. The committee want to make crystal clear its intention that the various banking factor in any particular case may be held to outweigh the competitive fac tors, and that the competitive factors, however favorable or unfavor able, are not, in and of themselves, controlling on the decision. And of course, the banking agencies are not bound in their consideratio of the competitive factors by the report of the Attorney Genera They will have much information in their own files, and they ma obtain information or advice on the competitive factors from othe sources. The committee amendment is only intended to make sur that the banking agencies get a report on the competitive factor from the Attorney General in each case.

The Attorney General is allowed 30 days to prepare his report o the competitive factors. This time limitation has been impose because of the need to act promptly on the application. Provisio is made for emergency cases, in which the banking agency may ca for a report within 10 days.

In addition, a provision is included for those exceptional cases wher immediate action is required in order to prevent the probable failur of one of the merging banks. This situation occurs seldom, but whe it does, immediate action is indispensable. It is considered that th situation is clearly within the general rule of the *International Sh* case, and therefore the Attorney General would in no case have an basis for an unfavorable report on the competitive factors.

State bank supervisors

In the case of every merger where the absorbing or resulting ban will be a State bank, approval by the appropriate State superviso or other banking authority will have to be obtained, in accordanc with the applicable State law, before the Federal Reserve Board o the FDIC will have an opportunity to review an application unde this bill.

If the State supervisor refuses his approval of the merger, no applica tion to the Federal Reserve Board or to the FDIC would even b considered. There is, therefore, no possibility that the Board or th FDIC would approve a merger which the appropriate State authoritie had finally rejected.

The only possibility of conflict is that the Board or the FDI might deny an application for a merger which the State superviso had approved. This kind of conflict is not new under the dua system of banking, however regrettable any specific instance may be Under the Board's or the FDIC's standards, the Board may alway deny membership, and the FDIC may always deny insurance, to State bank chartered by the appropriate State authority. The ban may still proceed to operate as a State-chartered bank, withou membership or without FDIC insurance, so long as the State super visor authorizes it to do so.

PLEMENTAL VIEWS OF MR. DOUGLAS, MR. CLARK, MR. PROXMIRE, AND MR. MUSKIE

(see p. 43)

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 18(c) OF THE FEDERAL DEPOSIT INSURANCE ACT

SEC. 18. (c) Without prior written consent by the Corporation, no insured bank shall (1) merge or consolidate with any noninsured bank or institution or convert into a noninsured bank or institution or (2) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution or (3) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank. No insured bank shall convert into an insured State bank if its capital stock, or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholders' meeting approving such conversion, without prior written consent by the Comptroller of the Currency if the resulting bank is to be a District bank, or by the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank), or by the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank). [No insured bank shall (i) merge or consolidate with an insured State bank under the charter of a State bank or (ii) assume liability to pay any deposits made in another insured bank, if the capital stock or surplus of the resulting or assuming bank will be less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or of all the parties to the assumption of liabilities, at the time of the shareholders' meetings which authorized the merger or consolidation or at the time of the assumption of liabilities, unless the Comptroller of the Currency shall give prior written consent if the assuming bank is to be a national bank or the assuming or resulting bank is to be a District bank; or unless the Board of Governors of the Federal Reserve System gives prior written consent if the assuming or resulting bank is to be a State member bank (except a District bank); or unless the Corporation gives prior written consent if the assuming or resulting bank is to a nonmember insured bank (except a District bank).] *No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank*

is to be a State member bank (except a District bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). In granting or withholding consent under this subsection, the Comptroller, the Board or the Corporation, as the case may be, shall consider the factors enumerated in section 6 of this Act. In the case of a merger, consolidation, acquisition of assets or assumption of liabilities, the appropriate agency shall also take into consideration whether the effect thereof may be to lessen competition unduly or to tend unduly to create a monopoly, and, in the interests of uniform standards, it shall not take action as to any such transaction without first seeking the views of each of the other two banking agencies referred to herein with respect to such question. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall request a report from the Attorney General on the competitive factors involved in the merger. The Attorney General shall furnish such report to such agency within thirty calendar days of the request: Provided, however, That in case the agency finds an emergency exists the agency may advise the Attorney General thereof and may thereupon shorten the period for the Attorney General to report to ten calendar days: And provided further, That where the agency finds that an emergency makes necessary immediate action in order to prevent the probable failure of one of the merging banks, the appropriate agency may act without obtaining such report from the Attorney General. No insured State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

[EXCERPTS FROM]

REGULATION OF BANK MERGERS

REPORT

OF THE

OMMITTEE ON BANKING AND CURRENCY

HOUSE OF REPRESENTATIVES

EIGHTY-SIXTH CONGRESS

SECOND SESSION

ON

S. 1062

ARCH 23, 1960.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1960

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REGULATION OF BANK MERGERS

н 23, 1960.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

SPENCE, from the Committee on Banking and Currency, submitted the following

REPORT

[To accompany S. 1062]

.e Committee on Banking and Currency, to whom was referred oill (S. 1062) to amend the Federal Deposit Insurance Act to ide safeguards against mergers and consolidations of banks which t lessen competition unduly or tend unduly to create a monopoly e field of banking, having considered the same, report favorably on with an amendment and recommend that the bill as amended ass.

ie amendment is as follows:

rike out all after the enacting clause and insert in lieu thereof the ving:

subsection (c) of section 18 of the Federal Deposit Insurance Act is amended iking out the third sentence and inserting in lieu thereof the following: "No d bank shall merge or consolidate with any other insured bank or, either ly or indirectly, acquire the assets of, or assume liability to pay any deposits in, any other insured bank without the prior written consent (i) of the troller of the Currency if the acquiring, assuming, or resulting bank is to national bank or a District bank, or (ii) of the Board of Governors of the al Reserve System if the acquiring, assuming, or resulting bank is to be a member bank (except a District bank), or (iii) of the Corporation if the ring, assuming, or resulting bank is to be a nonmember insured bank (except trict bank). Notice of any proposed merger, consolidation, acquisition of , or assumption of liabilities, in a form approved by the Comptroller, the l, or the Corporation, as the case may be, shall (except in a case where the hing of reports under the seventh sentence of this subsection is not required) blished, at appropriate intervals during a period (prior to the approval or proval of the transaction) at least as long as the period allowed under such ice for furnishing such reports, in a newspaper of general circulation in the unity or communities where the main offices of the banks involved are d (or, if there is no such newspaper in any such community, then in the paper of general circulation published nearest thereto). In granting or olding consent under this subsection, the Comptroller, the Board, or the ration, as the case may be, shall consider the financial history and condition

of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this Act. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection (which report shall be furnished within thirty calendar days of the date on which it is requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action). The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: the name and total resources of each bank involved; whether a report has been submitted by the Attorney General hereunder, and, if so, a summary by the Attorney General of the substance of such report; and a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval."

Amend the title so as to read: "An Act to amend the Federal Deposit Insurance Act to require Federal approval for mergers and consolidations of insured banks."

WHAT THE BILL WOULD DO

The bill as reported by your committee prohibits mergers[1] of federally insured banks without the approval of the appropriate Federal bank supervisory agency. If the merger is to result[2] in a national bank or a District of Columbia bank, approval must be obtained from the Comptroller of the Currency; if it is to result in a State bank that is a member of the Federal Reserve System, approval must be obtained from the Federal Reserve Board; if it is to result in an insured nonmember State bank, approval must be obtained from the Federal Deposit Insurance Corporation. In acting on a merger application, the agency having jurisdiction over the transaction will consider the following factors: The financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, whether the bank's corporate powers are consistent with the purposes of the Federal Deposit Insurance Act, and the effect of the transaction on competition (including any tendency toward monopoly). Approval will not be given unless, after considering all such factors, the agency finds the transaction to be in the public interest. Except where immediate action is needed to save a failing bank, the agency having jurisdiction over the transaction will request a report on the competitive factors involved from the other two banking agencies and from the Attorney General.

[1] For ease of reading this report ignores the technical distinctions between a true merger and other transactions by which two banks may end up as one through consolidation, acquisition of assets, or assumption of liabilities. The bill, however, covers all such cases.

[2] As indicated in footnote 1, this report ignores certain technical distinctions. The report uses "resulting bank" to include what is more accurately described in the bill as the "acquiring, assuming, or resulting bank."

THE COMMITTEE AMENDMENT

Your committee has agreed upon an amendment to the bill, striking out all after the enacting clause and inserting substitute provisions worked out by Subcommittee No. 2 of this committee, under the able chairmanship of Hon. Paul Brown. The principal effect of the substitute amendment relates to the standard used in acting on mergers. Both the Senate bill and the committee substitute require the appropriate banking agency to consider the six banking factors listed first in the preceding paragraph. The Senate bill added a seventh factor to be considered: whether the transaction would "unduly lessen competition or tend unduly to create a monopoly." The committee substitute requires consideration of the six banking factors plus "the effect of the transaction on competition (including any tendency toward monopoly)"; it also bars approval unless, after weighing all these factors, the agency finds the transaction to be in the public interest.

The committee substitute also makes certain changes in the procedures for obtaining reports from the other banking agencies and the Attorney General, and for reporting actions on bank mergers to Congress. These changes are explained more fully in the discussion of the reporting provisions of the bill (beginning p. 12).

The committee substitute also provides for notice of proposed mergers to be published in newspapers. This provision is explained on page 14.

NEED FOR IMPROVED CONTROLS OVER BANK MERGERS

Vigorous competition between strong, aggressive, and sound banks is highly desirable. Competition in banking takes many forms—competition for deposits by individuals and corporations and by personal and business depositors; competition for individual, business, and governmental loans; competition for services of various sorts. Competition for deposits increases the amounts available for loans for the development and growth of the Nation's industry and commerce. Competition for loans gives the borrowers better terms and better service and furthers the development of industry and commerce. Vigorous competition in banking stimulates competition in the entire economy, in industry, commerce, and trade. There is no question that competition is desirable in banking, and that competitive factors should be considered in all aspects of the supervision and regulation of banks.

The number of commercial banks in the United States has been slowly but steadily declining in the past 10 years. On January 1, 1950, there were 14,174 commercial banks in the country, but on December 31, 1959, the number had dropped to 13,460, a loss of 714 banks for the period. This occurred in spite of a tremendous increase in the country's need for banking services, and despite the fact that 887 new banks were chartered during the period. The net loss resulted from a strong trend toward mergers; on the average, 150 banks per year ceased to exist as separate institutions during this period. The 1,503 banks which disappeared represent more than 10 percent of all the banks in the country.

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Annual figures for this period, as furnished by the Comptroller of the Currency during the hearings on this bill, are as follows:

All commercial banks, 1950–59

Jan. 1, 1950:			
Total number of commercial banks			14,174
Less:			
New banks chartered during 1950		67	
Banks absorbed by merger during 1950	91		
Other banks discontinuing business during 1950	13		
		104	−37
Total commercial banks, Dec. 31, 1950			14,137
Jan. 1, 1951:			
Total number of commercial banks			14,137
New banks chartered during 1951		64	
Less:			
Banks absorbed by merger during 1951	84		
Other banks discontinuing business during 1951	10		
		94	−30
Total commercial banks, Dec. 31, 1951			14,107
Jan. 1, 1952:			
Total number of commercial banks			14,107
New banks chartered during 1952		71	
Less:			
Banks absorbed by merger during 1952	99		
Other banks discontinuing business during 1952	12		
		111	−40
Total commercial banks, Dec. 31, 1952			14,067
Jan. 1, 1953:			
Total number of commercial banks			14,067
New banks chartered during 1953		65	
Less:			
Banks absorbed by merger during 1953	115		
Other banks discontinuing business during 1953	7		
		122	−57
Total commercial banks, Dec. 31, 1953			14,010
Jan. 1, 1954:			
Total number of commercial banks			14,010
New banks chartered during 1954		72	
Less:			
Banks absorbed by merger during 1954	216		
Other banks discontinuing business during 1954	6		
		222	−150
Total commercial banks, Dec. 31, 1954			13,860
Jan. 1, 1955:			
Total number of commercial banks			13,860
New banks chartered during 1955		115	
Less:			
Banks absorbed by merger during 1955	225		
Other banks discontinuing business during 1955	13		
		238	−123
Total commercial banks, Dec. 31, 1955			13,737
Jan. 1, 1956:			
Total number of commercial banks			13,737
New banks chartered during 1956		122	
Less:			
Banks absorbed by merger during 1956	186		
Other banks discontinuing business during 1956	13		
		199	−77
Total commercial banks Dec. 31, 1956			13,660
Jan. 1, 1957:			
Total number of commercial banks			13,660
New banks chartered during 1957		88	
Less:			
Banks absorbed by merger during 1957	165		
Other banks discontinuing business during 1957	3		
		168	−80
Total commercial banks Dec. 31, 1957			13,580

All commercial banks, 1950–59—Continued

Jan. 1, 1958:			
Total number of commercial banks			13,580
New banks chartered during 1958		100	
Less:			
Banks absorbed by merger during 1958	151		
Other banks discontinuing business during 1958	15		
		166	−66
Total commercial banks Dec. 31, 1958			13,514
Jan. 1, 1959:			
Total number of commercial banks			13,514
New banks chartered during 1959		123	
Less:			
Banks absorbed by merger during 1959	171		
Other banks discontinuing business during 1959	6		
		177	−54
Total commercial banks Dec. 31, 1959			13,460

SUMMARY

Total number of commercial banks Jan. 1 1950			14,174
New banks chartered during period 1950–59		887	
Less:			
Banks absorbed by merger during period 1950–59	1,503		
Other banks discontinuing business during period 1950–59	98		
		1,601	−714
Total commercial banks Dec. 31, 1959			13,460

The large numbers of mergers in recent years, the vast resources involved in these mergers, and the increases in the size of the largest banks, particularly those which have grown through mergers, all give rise to concern for the maintenance of vigorous competition in the banking system and in the industry and commerce served by the banking system. The reduction in the number of banks and the loss of competition between merged banks also give rise to concern. There are differing views about the effect and the significance of the mergers which have taken place. But there is general agreement that legislation providing for uniform and effective regulation of mergers is required for the future.

Controls over bank mergers are incomplete and confusing, particularly with respect to the competitive factors involved. There are gaps in the controls exercised by the Federal banking agencies under banking statutes, and even where Federal approval is required before a merger may be completed, the standards are not clearly spelled out. Only two State statutes regulating bank mergers specifically authorize consideration of competition as a factor in approving or disapproving a merger, although in other States this factor is undoubtedly considered under some other standards. The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help.

MERGERS COVERED BY THE BILL

S. 1062 would apply to all bank mergers involving a bank insured by FDIC—National banks, State member banks, and insured nonmember banks. This would cover the vast majority of American banks. Approximately 95 percent of the banks in the United States are insured, and the insured banks hold over 97 percent of the total assets of all banks in the United States. The coverage of the bill can be judged by the following chart, showing a breakdown of bank mergers

for the past 3 years as to type of bank, which was furnished by the Federal Deposit Insurance Corporation:

Distribution of absorbed commercial banks by class and size of bank; absorptions, consolidations, and mergers in the United States (continental United States and other areas), 1957–59

NUMBER OF ABSORBED COMMERCIAL BANKS [1]

Classification	Total	Insured			Non-insured [2]
		National	State, members Federal Reserve System	Not members Federal Reserve System	
All absorbed commercial banks, 1957–59	472	188	92	176	16
Included at beginning of year of absorption among the—					
100 largest commercial banks	4	----------	4	----------	----------
2d 100 largest commercial banks	3	2	1	----------	----------
3d 100 largest commercial banks	3	1	2	----------	----------
With assets over $10,000,000, but not among 300 largest banks [3]	138	71	41	26	----------
With assets of $10,000,000 or less	324	114	44	150	16

ASSETS (IN THOUSANDS) OF ABSORBED COMMERCIAL BANKS [4]

Classification	Total	National	State, members Federal Reserve System	Not members Federal Reserve System	Non-insured
All absorbed commercial banks, 1957–59	$7,837,769	$2,720,491	$3,997,298	$1,094,544	$25,436
Included at beginning of year of absorption among the—					
100 largest commercial banks	2,498,468	----------	2,498,468	----------	----------
2d 100 largest commercial banks	504,959	354,731	150,228	----------	----------
3d 100 largest commercial banks	313,158	122,304	190,854	----------	----------
With assets over $10,000,000, but not among 300 largest banks [3]	3,299,556	1,742,981	973,571	583,004	----------
With assets of $10,000,000 or less	1,221,628	500,475	184,177	511,540	25,436

[1] For 1957 and 1958 from table 101, Annual Report of the Federal Deposit Insurance Corporation for the indicated year; for 1959 from tabulations to be included in the annual report for 1959.
[2] Includes banks of deposit and trust companies not regularly engaged in deposit banking.
[3] The largest 300 banks included those with assets of more than $86,000,000 in 1957; $89,000,000 in 1958; and $95,000,000 in 1959 (at beginning of year).
[4] From "Polk's Bank Directory"; data as of nearest available midyear or yearend date prior to absorption.

PRESENT FEDERAL BANKING LAWS ON BANK MERGERS

National banks

Where a proposed merger will result in a national bank, it can normally be completed only if the Comptroller of the Currency approves. But the statute governing such mergers sets forth no standards for the Comptroller to follow in acting on such proposals. In addition, there are special cases where, due to the form the transaction takes, approval is not directly required. That is, if the transaction is not a merger or consolidation in the technical sense, but takes the form of a national bank purchasing the assets and assuming the liabilities of another bank, the Comptroller's approval is not directly required unless the capital stock or surplus of the assuming bank will be less than the aggregate capital or surplus of the combining banks. Where there is no such diminution, the Comptroller can exercise indirect control through his power to approve the necessary increase in the capital of the assuming bank, and if one of the banks is to be continued as a branch, his approval is also required. The bill, however, would remove any confusion or doubt about the Comptroller's

power to act directly in these cases, and would set forth the standards on which he is to act, including the competitive factor specifically.

Federal Reserve member banks

The only direct authority the Federal Reserve Board has over mergers of member banks derives from section 18(c) of the Federal Deposit Insurance Act, which requires advance approval of the Board before a merger may take place which will result in a member bank with a smaller capital or surplus than the combined capital or surplus of the banks involved in the transaction. In most cases the resulting bank can be provided with capital and surplus as high as those of the merging banks. This means that usually the absorbing bank has it in its own power to prevent the Board from reviewing the merger directly.

The Board exercises an indirect control over mergers where one of the banks involved will continue as a branch of the resulting member bank, since the Board's approval is required before such a branch may be established. In such a case, the Board considers what effect the branch will have on competition, but the Board's authority to do so has been challenged in recent litigation; it was upheld in the trial court but appeal has been taken.[3]

In 1959, out of 42 mergers resulting in member banks, 19 mergers, involving total resources of almost $2 billion, did not require direct approval of the Board.

Insured State nonmember banks

The Federal Deposit Insurance Corporation's approval is required before any bank whose deposits it insures may merge with any non-insured bank. It also has, with respect to insured nonmember banks, the same power the Federal Reserve Board has with respect to member banks, in merger cases involving diminution of capital or surplus. Its power to exercise indirect control by approving or disapproving establishment of branches is also comparable to that of the Federal Reserve Board.

In the past 5 years there have been 162 mergers resulting in a State nonmember bank; in 66 of these FDIC approval was not required. In 1959, FDIC passed on 23 of 40 possible cases; in the 17 cases not requiring FDIC approval, total assets of $106 million were involved—75 percent more than the assets involved in the cases where approval was required.

The Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, a former chairman and long-time member of the Banking and Currency Committee, Hon. Jesse P. Wolcott, summed up this state of affairs as follows: "There is no question, then, that our present act is largely ineffective when it comes to control of bank mergers."

Summary

The effect of the gaps in Federal banking laws on mergers in recent years is summarized in the following material furnished by the Comptroller of the Currency:

[3] *Old Kent Bank & Trust Co.* v. *Martin et al.* (U.S. District Court for the District of Columbia, Civil Action No. 1999-58).

Recapitulation of consolidations, mergers, assumptions, not requiring approval of appropriate Federal bank supervisory agency, 1955 through 1959

I. State bank member of Federal Reserve System the continuing bank: Approval of Board of Governors of Federal Reserve System not required because the total capital stock or surplus of the resulting or assuming bank was not less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or all of the parties to the assumption of liabilities.

Year	Requiring Board approval	Not requiring Board approval	Total	Total resources, cases not requiring Board's approval
1955	38	30	68	$6,431,058,718
1956	30	24	54	214,314,262
1957	21	20	41	276,574,435
1958	21	23	44	523,258,520
1959	23	19	42	1,988,983,797
Total	133	116	249	9,434,189,722

II. State bank insured by Federal Deposit Insurance Corporation, but not a member of Federal Reserve System, the continuing bank: Approval of Federal Deposit Insurance Corporation not required because the total capital stock or surplus of the resulting or assuming bank was not less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or all of the parties to the assumption of liabilities.

Year	Requiring FDIC approval	Not requiring FDIC approval	Total	Total resources, cases not requiring FDIC approval
1955	25	9	34	$28,592,419
1956	16	11	27	30,472,858
1957	14	21	35	286,765,741
1958	18	8	26	92,336,858
1959	25	17	40	105,621,323
Total	98	66	162	543,789,199

III. National bank the continuing bank: Approval of Comptroller of the Currency not required to assumption of liabilities cases only because the capital stock or surplus of the assuming national bank was not less than the aggregate capital stock or aggregate surplus, respectively, of all the parties to the assumption of liabilities. While the Comptroller had no authority to approve or disapprove these transactions because there was no diminution in capital or surplus, the increase in capital by the resulting national bank did require the approval of the Comptroller. (Comptroller of the Currency required to approve or disapprove all consolidations or mergers where the continuing bank is a national bank under the provisions of specific statutes.)

Year	Consolidations and mergers requiring Comptroller's approval	Assumption cases		Total	Total resources, cases not requiring Comptroller's approval
		Requiring Comptroller's approval	Not requiring Comptroller's approval		
1956	73	51	2	126	$13,490,708
1955	69	32	4	105	36,950,778
1957	62	20	1	83	1,285,741
1958	53	30	----------	83	----------
1959	73	11	2	86	19,357,185
Total	330	[1] 144	9	483	71,084,412

[1] Includes 3 District of Columbia nonnational banks.

CONTROL OVER BANK MERGERS UNDER ANTITRUST LAWS

The Sherman Antitrust Act prohibits any contract, combination, or conspiracy in restraint of interstate or foreign trade or commerce, and makes it illegal to monopolize, or to combine, conspire, or attempt to monopolize, any part of such trade or commerce. Section 7 of the Clayton Act prohibits acquisitions of bank stock "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Because section 7 is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers "little help," in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers. Although the Sherman Act applies to asset acquisitions as well as to stock acquisitions, it has been of little use in controlling bank mergers. It has been used only once in court (in a proceeding initiated in March 1959) against a bank merger.

S. 1062 would not in any way affect the applicability of the Sherman Act or the Clayton Act to bank mergers.

SPECIAL STANDARDS NEEDED TO CONTROL BANK MERGERS

Sad experiences in our history have demonstrated that to maintain a sound banking system in this country banks must be regulated much more strictly than ordinary businesses. A bank charter may be obtained only after the supervisory authorities are convinced that there is a need for the bank in the community and its prospects of success are good. Once it is in operation, it is subjected to careful and continuing supervision, in order to avoid "wildcat banking" and other excesses which did much to bring on panics in earlier days.

This point is brought out in the following quotation from "Banking Under the Antitrust Laws," by A. A. Berle (49 Columbia Law Review (1949) 589, at 592):

> Operations in deposit banking not only affect the commercial field, but also determine in great measure the supply of credit, the volume of money, the value of the dollar, and even, perhaps, the stability of the currency system. Within this area considerations differing from and far more powerful than mere preservation of competition may be operating under direct sanction of law. It is the theory, in ordinary commercial fields, that competition is the desirable check on price levels—the process by which the efficient are rewarded by survival, and the inefficient eliminated by failure. The price of business failures is not regarded as too high for the community to pay in view of advantages to consumers, stimulus toward greater efficiency, and freedom of enterprise. But it is doubtful (to say the least) whether any such assumption is indulged in with respect to deposit banks; certainly the theory is not there accepted to the full extent of its logic. A bank failure is a community disaster, however, wherever, and whenever it occurs.

Because banking is a licensed and strictly supervised industry that offers problems acutely different from other types of business, the

bill vests the ultimate authority to pass on mergers in the Federal bank supervisory agencies, which have a thorough knowledge of the banks, their personnel, and their types of business. For the same reason, the bill requires consideration of the six banking factors now listed in section 6 of the Federal Deposit Insurance Act. Thus the supervisory agency would consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of the Federal Deposit Insurance Act.

Reference to these factors, while essential, would not alone suffice, because the section 6 standards do not give sufficient weight to the factor of competition.

THE COMPETITIVE FACTOR

The most difficult task your committee faced in considering the bill was in framing a standard to guide the supervisory agencies in weighing the effects of a proposed merger on competition. But out of the hearings one principle emerged, on which all witnesses seemed to agree, as a starting point: Some bank mergers are in the public interest, even though they lessen competition to a degree. Thus, most witnesses agreed that a bank merger would serve the public interest, even though it might lessen competition substantially, where there is a reasonable probability of the ultimate failure of the bank to be acquired; or where because of inadequate or incompetent management the acquired bank's future prospects are unfavorable and can be corrected only by a merger with the resulting bank; or where the acquired bank is a problem bank with inadequate capital or unsound assets and the merger is the only practicable means of solving the problem; or where several banks in a small town are compelled by an overbanked situation to resort to unsound competitive practices, which may eventually have an adverse effect on the condition of such banks, and the merger would correct this situation.

Recognizing that other factors may outweigh an adverse effect on competition, the Senate bill provided that the banking agency acting on a proposed merger should consider whether it would "unduly lessen competition or tend unduly to create a monopoly." In the Senate Banking and Currency Committee's report this language was interpreted as follows:

> The word "unduly" is used to show that any lessening of competition or tendency to monopoly which may be found by the agency—whether "appreciable," "perceptible," "slight," "substantial," "serious," or "great"—must be weighed and considered by the banking agency as just one of the several factors which will go to form its balanced judgment, on the basis of all of the factors involved.

Several witnesses before Subcommittee No. 2 objected to this language, on the ground that it is too ambiguous. They argued that the Clayton Act test should be applied because it has acquired more definite meaning through a long series of court interpretations. Your committee notes, however, that there have been relatively few cases

interpreting the Clayton Act since it was substantially changed in 1950, and that in one of these few cases it was interpreted as banning mergers having a given effect on competition, regardless of the benefits flowing from the merger. To meet this objection, the suggestion was made to apply the Clayton Act test generally, but write in specific exemptions to allow approval of mergers in the cases referred to above, involving probable failures, management problems, inadequate capital or unsound assets, or overbanked communities. This course seems unnecessarily hazardous, however, in view of the wide variety of situations in which a merger may be proposed in all good faith as a means of providing better banking service. Your committee concluded that it would be unwise to attempt to anticipate all possible situations where a merger would benefit the public, and incorporate them in a rigid, specific list of exemptions.

Your committee is convinced the Senate's approach is basically sound. Where demonstrable benefits would flow from a proposed merger, these should be weighed against any adverse effect on competition. Your committee feels, however, that the language of the Senate bill can be improved, to insure that the intent indicated in the legislative history of the bill in the Senate will be properly carried out. Your committee concurs with the Senate committee report's repeatedly expressed intent to allow approval of bank mergers that would be in the public interest, and with the following description of the process by which this question should be decided:

> The decision in most cases can be expected to be clear. In many cases the proposed merger will not reduce competition at all and there will be sound and convincing banking reasons for authorizing the merger. In other cases the proposed merger will clearly increase and strengthen competition, and there will be no banking factors which might lead to rejection of the merger. In still other cases, there will be serious danger of very considerable reduction in competition, and few or no sound banking reasons to approve the merger. In any of these cases, there need be little hesitation in approving or denying the application.
>
> The committee recognizes that in a relatively small number of cases, the balancing of the various factors will be difficult—some banking factors may be favorable, some may be unfavorable; some competitive factors may be favorable, others unfavorable.
>
> In such cases, the decision will not be simple. Full consideration will have to be given to the basic purposes of the statute; to promote a sound banking system, in the interest of the Government, borrowers, depositors, and the public; and to promote competition as an indispensable element in a sound banking system.

We are concerned, however, with some indications that under the Senate bill a merger could be approved even though it "unduly" lessened competition. While this result presumably was not intended, there are conflicting statements on this question in the legislative history of the bill in the Senate, and in the record of our hearings. Doubts on this score should obviously be removed. We are convinced, also, that approval of a merger should depend on a positive

showing of some benefit to be derived from it. As previously indicated, your committee is not prepared to say that the cases enumerated in the hearings are the only instances in which a merger is in the public interest, nor are we prepared to devise a specific and exclusive list of situations in which a merger should be approved. We do, however, reject the philosophy that doubts are to be resolved in favor of bank mergers. At the risk of saying the same thing another way, we feel the burden should be on the proponents of a merger to show that it is in the public interest, if it is to be approved. After all the factors have been weighed, the transaction should be approved only if the supervisory agency is satisfied that, on balance, its effect will be beneficial. For these reasons, we recommend adoption of the committee substitute.

REPORTS FROM THE OTHER BANKING AGENCIES

The bill divides responsibility over bank mergers among three separate agencies. This arrangement is a sound one, because as a general rule it will mean that the decision will be made by the Federal agency most thoroughly familiar with the banks involved. At the same time, it poses a practical problem, which was forcibly brought out during the hearings by the National Association of Supervisors of State Banks. In the words of Hon. Robert Myers, secretary of banking of the Commonwealth of Pennsylvania:

> Unless there is uniformity of application of the standards relating to merger approval to be applied by the Federal agencies to bank mergers, the equality of competitive position between the two banking systems so necessary for the continued existence of the dual system, which Congress has always carefully tried to preserve, will be impaired.

Your committee agrees that every effort must be made to avoid a situation where one Federal agency is "tough" about mergers and another one is "easy," where there might be an inducement to arrange mergers so as to result in the kind of bank where approval could be easily obtained. To help guard against this kind of development, the bill provides that the agency having jurisdiction over a proposed merger shall request a report from the other two banking agencies on the competitive factors involved, unless it must act immediately to prevent a bank failure. The committee substitute differs from the Senate bill as to the mechanics of this consultation. Following a suggestion made by Chairman Martin of the Federal Reserve Board, the procedure for obtaining the views of the other two banking agencies is made to conform with the procedure for obtaining a report from the Attorney General. That is, under the committee substitute (but not under the Senate bill) the supervisory agency having jurisdiction over the transaction can act to save a failing bank without seeking the views of the other banking agencies; and the other banking agencies are required to submit their views within 30 days (or within 10 days if an emergency exists requiring expeditious action). The committee substitute also provides that the report shall be requested on the competitive factors, rather than on all factors to be considered.

The problem of obtaining uniformity is particularly acute in regard to the competitive factors, and it is expected that this uniformity can be obtained without asking the other two banking agencies for reports on the banking factors, which could result in an unnecessary Federal encroachment on supervision of State banks. It is expected, however, that the other banking agencies will be furnished with any available information needed to render a competent opinion on the competitive factors involved.

The State bank supervisors expressed considerable concern whether the system of consultation called for by S. 1062 would achieve the necessary uniform standards, and therefore recommended that ultimate approval of all mergers involving insured banks be placed in the hands of one agency, the Federal Deposit Insurance Corporation. Under this recommendation, all mergers where a national bank survives would be approved by the Comptroller and the Federal Deposit Insurance Corporation, and a merger with a State insured bank surviving would be approved by the State bank supervisor and the FDIC. The committee recognizes considerable merit in the State bank supervisors' recommendation but believes that the consultation provided for by S. 1062 will achieve their purposes.

The State bank supervisors also recommended that the Comptroller of the Currency should not be consulted as to a merger involving just State insured banks, on the grounds that such consultation is inconsistent with the principles of the dual banking system. Your committee, however, believes the development of uniform standards in the administration of S. 1062 is of fundamental importance in preserving the dual banking system, and that such consultation is essential to the development of such uniform standards.

REPORTS FROM THE ATTORNEY GENERAL

The committee substitute retains a feature of the Senate bill which should prove most helpful in providing effective control of bank mergers. That is, it would require the appropriate bank supervisory agency to seek the views of the Attorney General as to the competitive factors involved in a proposed merger before acting on it. As in the case of the report from the other banking agencies, the report need not be sought where immediate action is needed to save a failing bank. Normally, the report must be filed within 30 days, but provision is made for filing within 10 days in an emergency. It should be emphasized that the report from the Attorney General is purely advisory. just as the reports from the other banking agencies are. The banking agency has the power and responsibility to approve or disapprove. At the same time, the Justice Department's long years of experience in the antitrust field have qualified them to render valuable advice to the bank supervisory agencies in regulating bank mergers. Your committee is happy to note that Chairman Martin of the Federal Reserve Board indicated he would give careful weight to the Attorney General's report. The cooperation between the Federal Reserve Board and the Attorney General in the administration of the Bank Holding Company Act of 1956 has been most commendable.

REPORTS TO THE CONGRESS

The bill provides that each of the three bank supervisory agencies shall include in its annual report to the Congress a description of the mergers it has approved during the period covered by the report. The report is to include the following information: The name and total resources of each bank involved; whether a report has been submitted by the Attorney General and, if so, a summary of its substance prepared by him; and a statement by the banking agency involved of the basis for approval. While the bill does not attempt to specify the particular factual situations in which mergers may be approved, this reporting requirement will provide the Congress with the opportunity to review how the standards specified in the bill are being applied, on a case-by-case basis.

The committee substitute differs from the Senate bill in two respects as to these reports. First, the Senate bill requires a special report on mergers, to be submitted semiannually. The committee substitute provides, instead, for including this information in the agency's annual report. Your committee recommends this change because it does not appear that special reports every 6 months are necessary to apprise Congress adequately of developments in this field. The second change makes it clear that the summary of the Attorney General's report on a merger shall be prepared by the Attorney General. Your committee feels it is not advisable to have the views of one agency on such involved matters summarized by a different agency.

PUBLICATION OF NOTICE OF PROPOSED MERGERS

Your committee included in the bill as reported a provision requiring that notice of a proposed merger be published in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located. This requirement is geared to the time limits specified for reports from the other banking agencies and the Attorney General, so as not to occasion any unnecessary delay. That is, in the normal case, notice must be published at appropriate intervals for at least 30 days before the banking agency finally approves or disapproves the merger; in an emergency, this may be shortened to 10 days. The bill does not require any such notice where a merger is needed to save a failing bank. This makes no substantial change in existing law for most mergers resulting in national banks, inasmuch as such notice is already required to run for at least 4 weeks under the act of November 7, 1918, as revised by section 20 of Public Law 86–230 (12 U.S.C. 215), which applies to all such mergers except those in the form of an acquisition of assets and assumption of liabilities. Thus, for most national bank mergers, the only change the bill makes is to add 2 days to the notice period in some cases.

Notice is also required now for mergers resulting in State banks, under the laws of many States.

This requirement will not, therefore, occasion any delay, or impose any unnecessary burden on the persons seeking to arrange a bank merger. It will, however, provide a means by which the people of the community served by the banks involved may be given an opportunity to consider the effects of a proposed merger and express their views concerning it in cases where they are sufficiently interested.

COMPLIANCE WITH STATE LAW

In the case of every merger where the resulting bank will be a State bank, approval by the appropriate State supervisor or other banking authority will, of course, have to be obtained, in accordance with the applicable State law,[4] before the Federal Reserve Board or the FDIC will have an opportunity to review an application under this bill.

If the State supervisor refuses his approval of the merger, no application to the Federal Reserve Board or to the FDIC would even be considered. There is, therefore, no possibility that the Board or the FDIC would approve a merger which the appropriate State authorities had finally rejected.

The only possibility of conflict is that the Board or the FDIC might deny an application for a merger which the State supervisor had approved. This kind of conflict is not new under the dual system of banking, however regrettable any specific instance may be. Under the Board's or the FDIC's standards, the Board may always deny membership, and the FDIC may always deny insurance, to a State bank chartered by the appropriate State authority. The bank may still proceed to operate as a State-chartered bank, without membership or without FDIC insurance, so long as the State supervisor authorizes it to do so.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as passed by the Senate, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SUBSECTION (c) OF SECTION 18 OF THE FEDERAL DEPOSIT INSURANCE ACT

(c) Without prior written consent by the Corporation, no insured bank shall (1) merge or consolidate with any noninsured bank or institution or convert into a noninsured bank or institution or (2) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution or (3) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank. No insured bank shall convert into an insured State bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholders' meeting approving such conversion, without prior written consent by the Comptroller of the Currency if the resulting bank is to be a District bank, or by the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank), or by the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank). [No insured bank shall (i) merge or consolidate with an insured State bank under the charter of a State bank or (ii) assume liability to pay any deposits made in another insured bank, if the capital stock or surplus of the resulting or assuming bank will be less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or of all the parties to the assumption of liabilities, at the time of the

[4] This is specifically required by statute in virtually all States.

shareholders' meeting which authorized the merger or consolidation or at the time of the assumption of liabilities, unless the Comptroller of the Currency shall give prior written consent if the assuming bank is to be a national bank or the assuming or resulting bank is to be a District bank; or unless the Board of Governors of the Federal Reserve System gives prior written consent if the assuming or resulting bank is to be a State member bank (except a District bank); or unless the Corporation gives prior written consent if the assuming or resulting bank is to be a nonmember insured bank (except a District bank).] *No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a district bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a district bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a district bank). In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the factors enumerated in section 6 of this Act. In the case of a merger, consolidation, acquisition of assets or assumption of liabilities, the appropriate agency shall also take into consideration whether the effect thereof may be to lessen competition unduly or to tend unduly to create a monopoly, and, in the interests of uniform standards, it shall not take action as to any such transaction without first seeking the views of each of the other two banking agencies referred to herein with respect to such question. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall request a report from the Attorney General on the competitive factors involved in the merger. The Attorney General shall furnish such report to such agency within thirty calendar days of the request: Provided, however, That in case the agency finds an emergency exists the agency may advise the Attorney General thereof and may there upon shorten the period for the Attorney General to report to ten calendar days: Provided further, That where the agency finds that an emergency makes necessary immediate action in order to prevent the probable failure of one of the merging banks, the appropriate agency may act without obtaining such report from the Attorney General: And provided further, That the Comptroller, the Board, and the Corporation shall each submit to the Congress a semiannual report with respect to each merger, consolidation, acquisition of assets, or assumption of liabilities approved by the Comptroller, the Board, or the Corporation, as the case may be, which shall include the following information: the name of the receiving bank; the name of the absorbed bank; the total resources of the receiving bank; the total resources of the absorbed bank; whether a report has been submitted by the Attorney General hereunder; and if approval has been given, a summary of the substance of the report made by the Attorney General, and a statement by the Comptroller, the Board, or the Corporation, as the case may be, in justification of its findings.* No insured State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

1960 HOUSE PROCEEDINGS ON THE BANK MERGER ACT OF 1960

[From the Congressional Record, Apr. 4, 1960]

Mr. SPENCE. Mr. Speaker, there is a recognized need for better Federal laws to regulate bank mergers. Bank mergers have been taking place at a rapid rate in recent years. During the past 10 years, there have been 150 bank mergers a year on the average. And these mergers have involved our biggest banks. For example, if you look at the list of the largest banks in the country today, you will see the second, third, fourth, and fifth top spots occupied by banks which owe their tremendous influence in large measure to absorptions of other banks by mergers.

The need for a better bank merger law has been recognized by both the President and the Congress. Both Houses of Congress passed bills on the subject in 1956, but their differences were not reconciled and so no legislation went to the White House. The Senate passed a bank merger bill again in 1957 but the House did not act. This bill, of course, passed the Senate last year.

The present Federal banking laws on this subject have several serious defects when it comes to controlling bank mergers. Many mergers can take place without approval of any Federal bank supervisory agency. Even where the Federal banking laws require such approval as a condition of a merger, they do not provide for uniform standards and in no case is the effect on competition even mentioned. The Federal antitrust laws also offer little help in controlling bank mergers. The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way. The Sherman Act has been invoked only once in court to stop a bank merger, and that case is still pending.

So I think you will agree there is a real need for this type of legislation.

The bill the committee has reported meets this recognized need by giving the Federal bank supervisory agencies control over all bank mergers resulting in banks that are federally insured. All such mergers would be judged by a uniform set of standards. The bill spells out seven factors the supervisory agencies are to consider. Six of these are banking factors, covering such matters as the prospects of the banks involved and the needs of the community, and the seventh factor is "the effect of the transaction on competition—including any tendency toward monopoly." After considering all these factors, the agency must find the merger would be in the public interest before approval may be given.

This puts control in the banking agencies, which have expert knowledge of the problems involved. At the same time, they will be required to get a report from the Attorney General, whose experience in the antitrust field qualifies him to furnish valuable advice in the administration of the bill.

This bill was reported out of the Banking and Currency Committee without a dissenting vote, and I urge you to vote for it in the hope it can be sent to the President without further delay.

Mr. BROWN of Georgia. Mr. Speaker, I am happy to recommend this bill to the House. It is a compromise bill, which I believe offers a sound solution to difficult problems that have proved a stumbling block to legislation in this field in recent years. Members of the House will recall that a bill to regulate bank mergers passed the House in 1956. Different bank merger bills passed the Senate in 1956, 1957, and 1959. The President has also urged Congress to enact legislation in this field. Until today, however, there has been considerable argument as to what form this legislation should take. I am privileged to serve as chairman of the subcommittee of the Banking and Currency Committee which undertook the task of reconciling these differences, and I am pleased to report that we had splendid cooperation from the chairman of the House Judiciary Committee, Hon. Emanuel Celler, as well as from the Federal bank supervisory agencies and the Department of Justice in working out the bill we have recommended to you. This bill was reported unanimously to the House by the Banking and Currency Committee.

As Chairman Spence has explained to you, the bill provides that no merger which is to result in a bank insured by the Federal Deposit Insurance Corporation may take place unless it has been approved by one of the Federal bank supervisory agencies—the Comptroller of the Currency for national banks, the Federal Reserve Board for State member banks, and the Federal Deposit Insurance Corporation for insured nonmember banks. This puts the responsibility for

acting on a proposed merger where it belongs—in the agency charged with supervising and examining the bank which will result from the merger. Out of their years of experience in supervising banks, our Federal banking agencies have developed specialized knowledge of banking and the people who engage in it. They are experts at judging the condition of the banks involved, their prospects, their management, and the needs of the community for banking services. They should have primary responsibility in deciding whether a proposed merger would be in the public interest.

The bill specifies six banking factors to be considered in acting on a proposed merger: That is, it requires the banking agency to take into consideration, for each of the banks involved, the financial history, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of the Federal Deposit Insurance Act. In addition to these six banking factors, the bill requires the agency to take into consideration the effect of the proposed transaction on competition—including any tendency toward monopoly. The agency will not approve the transaction unless, after weighing all these factors, it concludes that the proposed merger will be in the public interest.

In determining whether a merger is in the public interest, the banking agency will consider the several factors listed in the bill; after weighing them, the agency will determine whether the net balance is favorable or unfavorable, and will approve the merger only if the merger is in the public interest in the sense that this balance is favorable.

We want to be sure that the three different banking agencies are all using the same standards in passing on mergers; so the bill requires the agency handling the application to request reports from the other two banking agencies as to the competition factors involved before it approves or disapproves the merger. Also, the bill provides for a similar report from the Attorney General, so that the banking agencies will have the benefit of the long experience of the Antitrust Division in protecting competition in business generally. Normally, the other banking agencies and the Attorney General will have 30 days in which to submit their advisory reports. In emergencies, however, this may be shortened to 10 days. In an extreme emergency—that is, where immediate action is needed to save a failing bank—consultation will not be required. While this may seem somewhat cumbersome procedure, I feel it can work smoothly with proper cooperation among the agencies concerned and the results will be worth it.

There is general agreement that stronger, clearer, more uniform controls over bank mergers are needed. This bill will meet this need, in a way that assures a balanced consideration of the total effects of a merger, with appropriate consultation among all interested agencies. In this way, we can expect that bank mergers which will be beneficial will be approved, and those which will not will be stopped.

I urge the House to approve this bill.

Mr. CELLER. Mr. Speaker, I urge enactment of S. 1062 which would provide additional and vitally needed safeguards against bank mergers and consolidations which might lessen competition or tend to monopoly in the field of banking. This measure is, in my considered judgment, the minimum necessary to maintain a sound, vigorously competitive unit banking system in this country and to arrest a merger trend which is contributing substantially to the control of the Nation's banking business by fewer and larger financial institutions.

Our Antitrust Subcommittee, a few years ago, made a lengthy study and report which demonstrated dramatically the extent of concentration in banking that has been taking place in recent years, largely because of unfettered merger activity and inadequate Federal legislation. Our subcommittee study showed that while there were approximately 13,500 commercial banks in this country, the 100 largest controlled approximately 46 percent of the Nation's total bank assets, and more than 48 percent of the bank deposits. It showed that in 10 of the Nation's 16 leading financial centers, 4 banks owned more than 80 percent of all commercial assets; that in 9 of these financial centers, 2 banks owned more than 60 pe cent of all commercial bank assets; and that in each of the 16 leading financial centers, the first 2 banks owned more than 40 percent of all the commercial assets, the first 4 banks, 60 percent.

Such concentration is contrary to the fundamental premise that the banking system of the United States should rely for its vitality on vigorous competition by a multitude of independent banks, locally organized, locally financed, and locally managed. For unlike other countries, such as Great Britain, France, and Germany, where a few mammoth institutions control nearly all the banking facilities, the American system is based on competition as one of the strongest factors safeguarding a sound banking system.

A corollary matter of serious concern resulting from merger activity is the gradual decline in the total number of banks in the Nation. The fact is that the banking population of our country is at a 38-year low despite the postwar boom, despite the 286-percent growth in bank assets, despite the new high level of loans and deposits, despite the greatly increased use made of banking services, and despite the enormous growth in the number of depositors. As a consequence of this diminution of banks through mergers, competition among banking institutions has been lessened in communities through the Nation. Over 76 counties in the United States have no commercial banking facilities whatsoever; hundreds of small American communities have become bankless towns; and many others are served by only one bank in place of the two or three which existed in the 1920's.

In these circumstances, I think that the bill, provided it is properly administered, constitutes a significant step forward. True, it does not contain all the safeguards that I believe necessary to cope with the rash of bank mergers that have beset the Nation. For example, it would, in my opinion, have been preferable to have made provision for a hearing on the record and the right of court review, together with adoption of the competitive test contained in section 7 of the Clayton Act with specific exceptions for cases involving probable failures, management problems, inadequate capital or unsound assets, or overbanked communities.

But this should not obscure the fact that the bill represents a real achievement, due to large part to amendments added by the House and Senate Banking and Currency Committees, and by the Senate. Thus the bill has been materially strengthened by an amendment making mandatory agency consultation with the Attorney General on competitive factors and requiring the Attorney General to submit a report to the agency on such factors. In proposing such an amendment before the Senate Banking Committee, I testified that "it would be little short of folly to require the appropriate Federal bank supervisory agency to obtain the views of the other two banking agencies (with respect to competitive considerations), but not impose the same requirement in respect to seeking the informed advice of the Department of Justice—the agency specifically charged by Congress with responsibility for examining into competitive implications of proposed mergers." Pursuant to the amendment, it is clear, of course, that at the time of the request made to the Attorney General, the Federal banking agencies will make available to the Department of Justice all information in their possession which would be relevant to the Attorney General's determination of the competitive aspects of the merger. Such cooperation, it must be stressed, is essential to the prompt and complete performance of the responsibilities given to the Attorney General under the terms of the amendment.

The bill was also strengthened through adoption by the House Banking an Currency Committee of an amendment establishing as the competitive test "the effect on competition—including any tendency toward monopoly." This amendment alters the test contained in the Senate bill, namely, whether the merger "may lessen competition unduly or tend unduly to create a monopoly." As I testified, adoption of such a grotesque standard as "unduly" would mean that it "is the policy of Congress that a bank merger which tends to monopoly is in the public interest; that only if it tends unduly to monopoly should it be banned." That test, I emphasized, would do little, if anything, to insure competitive enterprise in banking.

Parenthetically, it may be pointed out that in construing the term "any tendency toward monopoly" specified by the House committee amendment, such cases as *United States* v. *DuPont* (353 U.S. 586, 592, 593) and *Transamerica Corp.* v. *Board of Governors* (206 Fed. 2d, 163, 169) will serve as a most useful guide.

Further amendments to the bill requiring annual reports to the Congress and publication in a newspaper of notice of proposed mergers, are salutary in the public interest. They are salutary because they will enable the Congress and the public to be informed of bank merger activity. And most important, they will enable the appropriate congressional committees to exercise close and continuing

scrutiny of the manner in which the banking agencies administer the competitive standards contained in the bill. Such scrutiny is of the utmost importance. For unless the banking agencies prohibit those mergers which have an anticompetitive effect as intended by this measure, there is the very real possibility indeed that our Nation's banking system will—and in short order—become dominated to a far greater extent than now by a handful of financial interests.

Mr. MULTER. Mr. Speaker, for many years Congress has been concerned with providing proper safeguards against mergers and consolidations of banks which tended to lessen competition or tended to create monopolies in banking.

The enactment of the present bill before the House is another step in improving the legislation on the subject.

The Sherman Antitrust Act and the Clayton Act apply in this field. But not to every phase of it and not as effectively as is desired. This bill in no way limits the Sherman Antitrust Act or the Clayton Act nor will its enactment in any way affect any pending actions or prosecutions under existing statutes.

The bill provides for control of all mergers by banks whose deposits are federally insured. In using the word "merger" I use it in its most all-inclusive sense because under the terms of the bill it will apply to mergers and consolidations and acquisitions of assets, no matter how accomplished.

The enactment of the bill will prohibit future mergers unless approved by the appropriate Federal banking agency. If the resulting bank is to be a national bank, the Comptroller of the Currency must approve; if a State bank which is a member of the Federal Reserve System, the Federal Reserve Board must approve; and if it is an insured State bank that is not a member of the Federal Reserve System, the Federal Deposit Insurance Corporation must approve.

In every case the approving agency must, in advance of approval, request a report from the Attorney General of the United States as to the competitive factors involved, except in such instances where immediate action is needed because of the emergencies that occasionally confront the supervisory agencies in dealing with banks. The Attorney General's report is advisory. In addition, each of the other supervisory agencies myst be consulted by the agency charged with considering the application in order to standardize the practice in dealing with such applications.

Much controversy arose during the course of the hearings on this bill in both Houses of Congress with reference to the extent that the competitive and monopolistic factors should be considered as determinative of these applications. All concerned agreed that all of the banking factors must be considered. There also seemed to be no disagreement that the competitive and monopolistic factors should also be considered. Under the Sherman Antitrust Act and under the Clayton Act the sole tests revolve around the lessing of competition and the creation of monopolies.

The language of S. 1062 as amended by the House Banking and Currency Committee and as it appears in the bill we are now about to pass in the House makes it clear that the competitive and monopolistic factors are to be considered along with the banking factors and that after considering all of the factors involved, if the resulting institution will be in the public interest, then the application should be approved and otherwise disapproved.

The banking agencies are thus free to approve a merger to save a failing bank, or to approve a merger brought about by emergent conditions even though such action necessarily lessens competition or creates a monopoly in the particular community involved.

Like most legislation of this type, it depends for its implementation upon the agencies of Government paying heed to the intent of the Congress. If this legislation does not have the desired and desirable effect of calling a halt to the rash of bank mergers that we have witnessed in this country over the last several years, with the undersirable effect of constantly reducing the number of banks which are serving the public and increasing to inordinate size the big banks of the country at the expense of the small and independent banks, then much more restrictive legislation will be called for.

Under no circumstances is the enactment of this bill to be taken as an indication that the Congress acquiesces in any of the bank mergers and consolidations that have heretofore occurred.

1960 SENATE PROCEEDINGS ON THE BANK MERGER ACT OF 1960

[From Congressional Record, May 6, 1960]

AMENDMENT OF FEDERAL DEPOSIT INSURANCE ACT TO PROVIDE SAFEGUARDS AGAINST MERGERS AND CONSOLIDATIONS OF BANKS

Mr. JOHNSON of Texas. Mr. President, for the information of all Senators, I believe the distinguished Senator from Arkansas (Mr. Fulbright), former chairman of the Committee on Banking and Currency, in the absence of the Senator from Virginia (Mr. Robertson), who is absent because of a death in his family, is prepared to make a motion in connection with the bank merger bill.

I do not believe it will take very long. It is not controversial. However, I ask unanimous consent that the Senator from Arkansas may make the motion at this time, and that there be not to exceed 5 minutes debate, pro and con.

The PRESIDING OFFICER (Mr. Byrd of West Virginia in the chair). Is there objection? The Chair hears none, and it is so ordered.

Mr. FULBRIGHT. Mr. President, I ask that the Chair lay before the Senate a message from the House on the bill S. 1062 with the amendment of the House thereto.

The Presiding Officer laid before the Senate the amendments of the House of Representatives to the bill (S. 1062) to amend the Federal Deposit Insurance Act to provide safeguards against mergers and consolidations of banks which might lessen competition unduly or tend unduly to create a monopoly in the field of banking, which were, to strike out all after the enacting clause and insert:

"That subsection (c) of section 18 of the Federal Deposit Insurance Act is amended by striking out the third sentence and inserting in lieu thereof the following: 'No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). Notice of any proposed merger, consolidation, acquisition of assets, or assumption of liabilities, in a form approved by the Comptroller, the Board, or the Corporation, as the case may be, shall (except in a case where the furnishing of reports under the seventh sentence of this subsection is not required) be published, at appropriate intervals during a period (prior to the approval or disapproval of the transaction) at least as long as the period allowed under such sentence for furnishing such reports, in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located (or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto). In granting or withholding consent, under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this Act. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection (which report shall be furnished within thirty calendar days of the date on which it is requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action). The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved

by it during the period covered by the report, along with the following information: the name and total resources of each bank involved; whether a report has been submitted by the Attorney General hereunder, and, if so, a summary by the Attorney General of the substance of such report; and a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval.' "

And to amend the title so as to read: "An Act to amend the Federal Deposit Insurance Act to require Federal approval for mergers and consolidations of insured banks."

Mr. FULBRIGHT. Mr. President, I move that the Senate concur in the amendment of the House.

Senate bill 1062 was introduced on February 16, 1959. It was sponsored by the Senator from Virginia [Mr. Robertson], the Senator from Indiana [Mr. Capehart], and myself. S. 1062 was based on bills which had previously passed the Senate, S. 3911, 84th Congress, in 1956, and section 23 of title III of the financial institutions bill, S. 1451, 85th Congress, in 1957.

The Banking and Currency Committee held hearings on S. 1062. The committee considered the bill thoroughly and amended it to require reports from the Attorney General on prospective mergers.

The Senate debated the bill thoroughly and amended it to require semiannual reports to Congress on approved mergers.

The House Banking and Currency Committee held hearings and made a number of additional amendments, which I will discuss later. The bill, as amended by the House committee, passed the House on April 4, 1960.

Since the bill has already been thoroughly considered by the Senate, it is not necessary to discuss at length the reasons for the bill—the great number of mergers which have recently been taking place and the vast resources involved in these mergers; and the fact that many bank mergers are subject to virtually no control, and even those which are subject to control are not covered by clear standards with respect to competitive factors.

On previous occasions when the Senate has considered bank merger bills, the principal issue has been whether bank mergers should be regulated by the Federal bank supervisory agencies—the Comptroller of the Currency in the case of national banks, the Board of Governors of the Federal Reserve System in the case of State member banks, and the FDIC in the case of insured nonmember banks—on the basis of banking factors and competitive factors, like other regulated industries; or whether bank mergers should be subject to the antimerger provisions of section 7 of the Clayton Act, like ordinary nonregulated industrial or commercial enterprises.

As it passed the Senate, S. 1062 expressed the view of the Senate, for the third time, that bank mergers should be regulated by the Federal banking agencies on the basis of banking factors and competitive factors, with no single factor being in itself controlling. S. 1062 was a clear statement, for the third time, of the Senate's view that the provisions of section 7 of the Clayton Act should not apply to bank mergers.

The amendments to S. 1062 made by the House do not change this aspect of the bill. The House has agreed with the Senate that bank mergers should be controlled by the Federal banking agencies on the basis of both banking factors and competitive factors, and that section 7 of the Clayton Act should continue to be inapplicable to bank mergers.

Banking is regulated and subject to many controls not applicable to the ordinary industrial or commercial enterprise: Entry into the field of banking is restricted; the establishment of branches is restricted; and the practices and procedures of banking, from the payment of interest on deposits to the kinds of loans made and the reserves which must be maintained, are closely regulated and controlled. Competition in banking is desirable and beneficial; but unrestricted competition in banking, with the bank failures which would result, is no more possible than it is in the field of public utilities or other industries affected to a greater or lesser extent with the public interest. Banking is too important to depositors, to borrowers, to the Government, and the public generally, to permit unregulated and unrestricted competition in that field.

The antitrust laws have reflected an awareness of the difference between banking and other regulated industries on the one hand, and ordinary unregulated industries and commercial enterprises on the other hand. The 1950 amendment to section 7 of the Clayton Act, which for the first time imposed controls over mergers by means other than stock acquisitions, did not apply to bank mergers which are practically invariably accomplished by means other than stock

acquisition. Accordingly for all practical purposes bank mergers have been and still are exempt from section 7 of the Clayton Act.

It is not clear whether the Sherman Antitrust Act of 1890 would now be held to apply to banking in general and to bank mergers in particular, though it seems clear that Senator John Sherman, the former Secretary of the Treasury, for whom the act was named, and the 51st Congress, did not expect or intend banking to be covered by an act applicable to interstate commerce. And even if the Sherman Act is held to apply to banking and to bank mergers, it seems clear that under the rule of reason spelled out in the *Standard Oil* case, different considerations will be found applicable, in a regulated field like banking, in determining whether activities would "unduly diminish competition," in the words of the Supreme Court in that case.

I should like to explain the amendments made by the House in more detail.

The House committee bill, which was passed by the House under suspension of rules on April 4, is a complete substitute for S. 1062.

Both bills require the appropriate banking agency to consider the six banking factors set forth in the Federal Deposit Insurance Act. These are: First, the financial history and condition of each of the banks involved; second, the adequacy of its capital structure; third, its earnings prospects; fourth, the general character of its management; fifth, the convenience and needs of the community to be served; and sixth, whether the bank's corporate powers are consistent with the purposes of the Federal Deposit Insurance Act. S. 1062 incorporated these factors by reference; the House amendment lists them.

S. 1062, as passed by the Senate, added a seventh factor to be considered: whether the transaction would "unduly lessen competition or tend unduly to create a monopoly." The House bill substitutes for this the requirement that "the appropriate agency shall also take into consideration the effect of the transaction on competition—including any tendency toward monopoly."

The House amendment goes on to provide that the merger "shall not" be approved unless, "after considering all such factors, it—the agency—finds the transaction to be in the public interest."

The House amendment, like the Senate version of S. 1062, makes it clear that the banking factors and the competitive factors must be considered by the banking agencies. The House amendment, like the Senate version of S. 1062, makes it clear that no one of these factors is controlling. In any given merger, competitive factors unfavorable to the merger may be outweighed by banking factors favorable to the merger, and competitive factors favorable to the merger may outweigh banking factors unfavorable to the merger. All of these seven factors must be considered and weighed together, and the merger should be approved only if, after consideration of all of these factors, the net result is in favor of the proposal.

This balancing of favorable and unfavorable banking factors along with favorable and unfavorable competitive factors, with no one of them being overlooked and no one of them being controlling, was just what was meant by the Senate when it used the word "unduly" in referring to the competitive factors. I am satisfied that the House has reached just the same result the Senate reached three times before.

This is made clear at pages 11 and 12 of the House report, where it is stated that:

"Your committee is convinced the Senate's approach is basically sound. Where demonstrable benefits would flow from a proposed merger, these should be weighed against any adverse effect on competition. Your committee feels, however, that the language of the Senate Bill can be improved, to insure that the intent indicated in the legislative hisotory of the bill in the Senate will be properly carried out. Your committee concurs with the Senate committee report's repeatedly expressed intent to allow approval of bank mergers that would be in the public interest.

"After all the factors have been weighed, the transaction should be approved only if the supervisory agency is satisfied that, on balance, its effect will be beneficial."

This understanding was also expressed by Representative Brown, chairman of the subcommittee which handled the bill, in presenting the bill to the House, at page 7258, of the Congressional Record. Representative Brown said:

"In determining whether a merger is in the public interest, the banking agency will consider the several factors listed in the bill; after weighing them, the agency will determine whether the net balance is favorable or unfavorable, and will approve the merger only if the merger is in the public interest in the sense that this balance is favorable."

The PRESIDING OFFICER. The time of the Senator from Arkansas has expired.

Mr. FULBRIGHT. Mr. President, I ask that I may have 3 additional minutes.

Mr. JOHNSON of Texas. Mr. President, I yield 3 minutes to the Senator from Arkansas.

Mr. FULBRIGHT. I was quoting from Representative Brown's explanation of the purpose and meaning of the phrase "in the public interest."

The phrase "in the public interest" as used in S. 1062 is not independent; it is not isolated. The phrase is specifically and clearly tied in with the banking and competitive factors which are specifically listed in the bill. The language of the bill is entirely clear on this point:

"The agency shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest."

This distinguishes the phrase "in the public interest," as here used, from comparable phrases in other statutes where the phrase, "consistent with the public interest," is used as a general standard without reference to specific factors.

The phrase, "in the public interest," is not a new standard itself. It is not an eighth factor. It does not call for a separate finding that a proposed merger is "in the public interest," aside from the banking factors and competitive factors which must be considered. The phrase is used only to indicate that if the merger is to be approved, the weighing of the seven specified factors must have resulted in a finding favorable to a merger.

The requirement that a favorable finding must be made if the merger is to be approved means only that a beneficial result must appear after the weighing of the seven specific factors set forth in the bill. It does not require the agency to go beyond these seven factors and find an independent and separate public interest in the merger.

The requirement of a favorable finding after weighing these seven factors does not seem out of place in this legislation. A favorable finding would have to be made, for example, in other cases which the banking agencies must consider, such as the chartering of a new bank. It is this distinction between banking and other businesses which justifies different treatment for bank mergers and other mergers. It was this distinction that led the Senate to reject the flat prohibition of the Clayton Act test which applies to other mergers.

Furthermore, with respect to the requirement of a favorable finding, it is clear this question remains entirely within the determination of the Federal banking agency passing upon the merger, to be based upon its weighing of the six "banking" factors and the "competitive" factor.

The Senate version of S. 1062 required the banking agency considering a merger to obtain a report from the Attorney General on the competitive factors involved in the merger. This report was required in order that the Attorney General's knowledge and background of experience in the field of anticompetitive and monopolistic matters should be made available to the banking agencies in their consideration of bank mergers. At the same time, it was made clear that the Attorney General's report on competitive factors was limited to this one aspect of the proposed merger. The Attorney General was not expected to consider or report on the various banking factors involved, nor was he expected to make any recommendation as to the action the banking agencies should take on the basis of consideration of all of the factors involved. Under these circumstances, while cooperation is, of course, expected between the banking agencies and the Justice Department, it is not intended that this provision should give the Justice Department free entry to the files of the banking agencies. It is not intended that the Justice Department would have any occasion to examine the banking agencies' files relating to the banking factors under consideration and, in particular, it is expected that the banking agencies will continue to give the bank examiners' reports the same confidential treatment which the Department of Justice gives to FBI reports.

The House made several amendments to the bill with respect to the mechanics of consultation among the banking agencies. The procedure for obtaining the views of the other two banking agencies, by the banking agency which has final responsibility, is made to conform with the procedure for obtaining a report from the Attorney General. Under the House bill, the supervisory agency having jurisdiction can act to save a failing bank without seeking the views of the other banking agencies; and the other banking agencies are required to submit their views within 30 days, or within 10 days if an emergency exists. The House amendment also provides that the reports of the other banking agencies shall be requested only on the competitive factors, rather than on all factors to be considered, including the banking factors.

The Senate bill required semiannual reports of the bank supervisory agencies; the House amendment provides instead for including this information in the agencies' annual reports. The Senate bill provided for a summary by the banking agencies of the Attorney General's reports; the House amendment makes it clear that the summary should be prepared by the Attorney General.

An entirely new provision in the House amendment is a requirement that notice of a proposed merger be published in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located. In the normal case, the notice must be published at least 30 days before the banking agency approves or disapproves the merger, with exceptions for emergency situations. A similar requirement now exists for national bank mergers and for bank holding company acquisitions.

I have consulted with members of the Senate Committee on Banking and Currency who would be conferees if the bill were to be sent to conference, and we are agreed that the Senate should agree to the House amendments.

I should add that I believe this bill, providing for effective regulation of bank mergers for the first time, is a significant accomplishment. We have tried for a long time to enact sound legislation on this subject and I trust we shall now be successful.

I move that the Senate concur in the House amendments to the bill, S. 1062.

During the delivery of Senator Fulbright's remarks,

Mr. BENNETT. Mr. President, will the Senator from Arkansas yield?

Mr. FULBRIGHT. I yield.

Mr. BENNETT. We are now operating under a strict time limitation. As the Senator from Arkansas knows, the chairman of the committee, the Senator from Virginia [Mr. Robertson] and I prepared a set of questions and answers in order to set forth and make clear our understanding of the purpose and effect of the bill.

Mr. FULBRIGHT. Yes. That is correct. The Senator from Virginia [Mr. Robertson] prepared answers to several questions which the Senator from Utah [Mr. Bennett] had posed. These answers represent the views of the Senator from Virginia, who is chairman of the Committee on Banking and Currency and the Subcommittee on Banking. Other members of the committee have considered these questions and answers and they represent, I am satisfied, the committee's understanding of the bill, and the correct understanding of the bill.

Mr. BENNETT. Mr. President, in order to make clear to the banking agencies, which will administer this act, the understanding and intention of the Senate in accepting the amendments of the House and passing the amended bill, I ask unanimous consent that this set of questions and answers be printed in the Record following the statement by the Senator from Arkansas, as though I had asked the questions and the Senator from Arkansas had made the answers.

The PRESIDING OFFICER. Without objection, it is so ordered.

"EXHIBIT 1

"BANK MERGER BILL

"Question. As I understand it, this bill is not directed against nor intended to prescribe or limit size as such, without regard to the banking and competitive tests set forth in the bill, and hence a merger of two large banks should be approved if found to be in the public interest under the tests set down in the bill. Suppose, for example, a situation where such a merger would increase the extent, quality, and efficiency of services rendered to the public, enhance local, regional, or national competition, and meet all the other specific tests in the bill, would not such a merger be considered to be in the public interest under this bill, regardless of size?

"Answer. Yes. The bill is not directed against size as such, nor does it impose limits on the size of banks. Size may be, of course, an element to be considered as part of the banking tests and as part of the competitive test under the bill. But it is not controlling. If a merger of two large banks qualifies under the tests set forth in the bill, it should be approved and it will be approved, no matter how big the two banks may be.

"Question. The competitive factor in the bill I take to refer, in appropriate cases, not only to local but also to State, regional, and national competitive effect. Is this correct?

"Answer. Yes. The Federal banking agency reviewing a proposed merger should consider whatever field of competition the merging banks are engaged in and the new bank will engage in. Some banks are engaged only in local competi-

tion. Other banks are primarily engaged in regional competition. Other banks engage in national or international competition. The field of competition which is actually involved is the field which should be given consideration in reviewing a merger. This is true also of the Justice Department reports on the competitive factors involved in the merger. These, too, should be concerned with the kinds of competition the two banks are now engaged in and the kind of competition the merged banks will be engaged in.

"Question. In considering a proposed merger, should the needs of the community and the area and the country as a whole for increased financial services resulting from an expanding economy be considered?

"Answer. Yes. The Federal banking agency reviewing a merger under S. 1062 would certainly give due regard to the adequate accommodation of the growing capital requirements of an expanding economy in the community, in the area, and in the country generally. This would not, of course, be the controlling factor any more than any other single factor and, of course, other means of providing increased financial services would be borne in mind.

"But there is no question that the Federal banking agency should give due regard to the adequate accommodation of the growing capital requirements of an expanding economy.

"Question. In considering a proposed merger, would the responsible Federal banking agency be able to take into consideration the competition which the merging banks face, and the merged bank would face, from other kinds of financial institutions—savings and loan associations, credit unions, insurance companies, finance companies, and the like?

"Answer. Yes, indeed. All competition which the merging banks now face, and which the merged bank would face, must be taken into consideration by the banking agency. This includes both competition from other banks and trust companies and competition from other financial institutions which may provide the same or similar services. It includes competition for the public's funds, in the form of deposits, savings accounts, and the like, and it includes competition in supplying the public's needs for funds in the way of personal loans, consumer credit, mortgages, business loans, and so on.

"Question. Mergers already effected have given some banks distinct competitive advantages because of increased lending limits, increased quantity and quality of services, increased availability of highly specialized and technical personnel, and increased overall resources. Other banks have not so grown in size through mergers because of lack of feasible merger opportunities, State laws, management policy, or other reasons. If the effect of the adoption of this bill is to discriminate against these latter banks and thereby to affect adversely their future opportunity to acquire or regain reasonable competitive equality through merger, then we shall be protecting and making permanent a competitive advantage or, a kind of monopolistic position. It is my understanding that such a discriminatory result is not intended, and that the competitive test in this bill should not be so construed. Is that correct?

"Answer. S. 1062 is not intended to have any discriminatory results. It is not intended to discriminate against banks which have been unable to merge in the past because of State laws or any other reasons. The fact that a bank has been unable to merge in the past, and therefore is at a competitive disadvantage with other banks, is something which can be and should be taken into consideration by the banking agency reviewing a merger application. The bill is not intended to prevent banks which have not been able to merge from acquiring or regaining reasonable competitive equality through merger.

"Of course, this does not mean that merely because a bank was unable to grow by merger before the enactment of S. 1062, it would thereby have a right to engage in a merger which otherwise would be ruled out by the standards of S. 1062. The standards set forth in S. 1062 are the controlling tests; the competitive disadvantage which a bank is suffering from because it could not previously merge is to be considered as just one of the factors entering into these tests."

Mr. Javits. Mr. President, will the Senator yield?

Mr. Fulbright. I yield.

Mr. Javits. I ask unanimous consent that a letter I have received from Mr. J. Russell Clark, superintendent of banks of New York, be printed at this point in the Record. Mr. Clark raises two questions, which have been written out for Senator Robertson, together with Senator Robertson's answers to those questions. If the Senator from Arkansas agrees—and I understand that he does—I ask unanimous consent that the questions and answers may also be printed at this point in the Record.

Mr. FULBRIGHT. That is correct. The Senator from Virginia [Mr. Robertson] prepared answers to the questions posed by the Senator from New York [Mr. Javits]. In order to make clear to the banking agencies which will administer this act the understanding and intention of the Senate in passing this bill, I join in the request of the Senator from New York [Mr. Javits].

There being no objection, the letter and the questions and answers were ordered to be printed in the Record, as follows:

"STATE OF NEW YORK,
"BANKING DEPARTMENT,
"*New York, N.Y., April 28, 1960.*

"Hon. JACOB J. JAVITS,
"*Committee on Labor and Public Welfare,*
"*U.S. Senate, Washington, D.C.*

"DEAR SENATOR JAVITS: Reference is made to your letter of April 11, 1960, requesting my views and comments on S. 1062, as amended by the House of Representatives.

"I believe the amendments to such bill effected by the House of Representatives to be most constructive and desirable. The criteria specified under the bill is quite similar to the criteria that we in New York are required to consider in approving or disapproving bank mergers, as well as applications to form or to expand bank holding companies. Moreover, such criteria are similar to those required to be considered by the Board of Governors of the Federal Reserve System under the Bank Holding Act of 1956. I personally believe there should be no substantial difference between the criteria to be considered in approving or disapproving a merger and those to be considered in approving or disapproving the formation or expansion of a bank holding company. Consequently, I believe the criteria now contained in the bill to be vastly superior to the criteria previously specified in the original Senate version.

"As I pointed out in a speech which is included in the House report, I have some doubts as to how the adjective 'unduly,' as applied to a lessening of competition, in the original Senate version, would be interpreted in those cases where banking factors did not necessitate approval of a proposed merger. Ultimately, the courts would have had the responsibility of interpreting the adjective 'unduly' in the original Senate version, for the very indefiniteness as to what was meant by the use of such adjective as contrasted with the 'substantial' as employed in the Clayton Act, would probably have lead to extended litigation. I firmly believe that the House in deleting the adjective 'unduly' has negated a great deal of needless litigation. In passing, I should like to note that the title to the act still retains the adjective 'unduly' and in view of the new criteria, I would suggest that the title to the act be changed.

"I would also like to call your attention to the remarks in my statement in regard to whether the bill may not place State-chartered banks somewhat at a disadvantage as compared to national banks, since in the case of State bank mergers both a State and a Federal supervisory agency are required to approve, while in the case of national banks, only approval by the Comptroller's Office is required. On the other hand, I believe the requirement that each of the Federal agencies consult with the others as to their opinions with respect to competitive factors would certainly tend to reduce the possibility that the various supervising agencies will adopt conflicting policies. Perhaps State banks might be placed in a more equal position, if it were made clear that the Comptroller could not approve a merger where the principal consideration was the possible adverse effect upon competition, if both the FDIC and the Federal Reserve were of the opinion that the effect on competition would be adverse. Of course, I must admit that as a practical matter I doubt that the Comptroller would so approve in the face of the opposition of both the Federal Reserve and the FDIC and, therefore, do not strongly urge this point.

"I would, however, like to call your attention to the House report accompanying S. 1062, which states that the approval of the merger should depend 'on a positive showing of some benefit to be derived from it * * * the burden should be on the proponents of a merger to show that it is in the public interest, if it is to be approved * * *.' New York State's approach to this same point is that it is necessary to determine whether the effect on competition is such as to be injurious to the public interest. In other words, under New York's approach, if all other factors are equal, approval would be granted unless it can be shown that the public will be harmed. In the majority of cases, this difference is purely a matter of semantics, but it can be controlling in a few unique situations. Personally,

I believe that the inference that a proposed merger should be affirmatively in the public interest creates an unfortunate inference that banks, unlike other segments of private industry, do not have the right to engage in mergers unless the public can benefit therefrom, rather than merely having the burden of showing that there would be no substantial harm to the public through a lessening of competition. In addition, of course, there is the possibility that over the years a more and more affirmative showing that a particular merger is in the public interest may be required by the Federal supervisory authorities either as a result of conviction or public pressure. On the other hand, I think it to be obvious that a merger is either in or against the public interest. If it is clear that the burden of proof is to be placed on the applying banks to show that the merger is in the public interest, I think there could be no reasonable objection to the intent of the House report. The reason for this is that in my experience the question of burden of proof is not too important, since it has always been the individual investigation on the part of the supervisory authorities which has been controlling and not what the parties allege. Consequently, if it was intended merely to place the burden of proof on the applying parties, I think there could be no reasonable objection to this, but I think such intent should be made clear.

"With the foregoing qualification, I certainly would recommend enactment of S. 1062 by the U.S. Congress, as I believe it to be a constructive and desirable step in achieving uniformity in the approach of bank supervisory authorities toward mergers.

"If I may be of any further assistance in connection with this matter, please do not hesitate to communicate with me.

"Very truly yours,

"G. RUSSELL CLARK."

"Question. Mr. Clark inquires whether the bill may place State-chartered banks at a disadvantage as compared with national banks. He thinks such a disadvantage might arise out of the fact that, in the case of State bank mergers, both a State and Federal supervisory agency must approve the merger, while in the case of national banks only the approval of the Comptroller is necessary. Mr. Clark recognizes that as a practical matter, the Comptroller probably would not approve a merger in the face of the opposition of both the Federal Reserve and the FDIC. Could I have your comments on this point?

"Answer. It was to avoid the possibility of discriminatory treatment between State banks and national banks or between State member banks and State nonmember insured banks that, when one of these agencies is considering a merger, it is required to get the comments of the other two agencies on the other competitive factors involved. This provides for the maximum of uniformity of treatment among the three agencies. Certainly we all expect that the consultation and the cooperation among these three Federal banking agencies will be close and will be meaningful. I do not, of course, expect that they will agree 100 percent in every case, but I do expect that they will pay careful attention and give great weight to the views of the agencies, and I do expect that in most cases there will be no disagreement between them.

"Question. Mr. Clark also raises a question about a case where there is no positive showing of benefit resulting from the merger and no positive showing of detriment. Mr. Clark points out that under these conditions New York State would approve a merger. Could I have your comments on this question?

"Answer. These cases, where the banking agency in charge just cannot make its mind up, sound difficult. But I question whether in fact they will really cause much trouble.

"I see that Mr. Clark thinks that in most cases the difference would be purely a matter of semantics—in most cases, he says, it will be obvious that a merger is either in the public interest or against the public interest. In most cases, in other words, the banking agency will be able to make up its mind.

"Much of the trouble comes, I think, from misunderstanding and overemphasizing the expression 'in the public interest.' This expression does not mean that the agencies will have to find a direct and immediate benefit to the public, as Mr. Clark suggests. On the contrary, all this expression means is that, after considering all the seven factors and giving due weight to each of them, the agency can approve only if the net result of the seven factors is favorable."

The PRESIDING OFFICER. The time of the Senator from Arkansas has expired.

Mr. DIRKSEN. Mr. President, I yield 1 minute to the Senator from Connecticut.

Mr. BUSH. Mr. President, I have talked with the chairman of our committee, who is not here, and have assured him that I am in full accord with his conclusion to accept the House bill. The explanation of the bill given by the Senator from

Arkansas [Mr. Fulbright], and particularly the questions and answers developed by the Senator from Virginia [Mr. Robertson] and the Senator from Utah [Mr. Bennett] give a clear statement of the purpose of the bill and the way in which it is to be administered by the banking agencies. I am glad that we have been assured, by informal conversations with representatives of the American Bankers Association, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, that the House bill is acceptable to those organizations. I understand the Comptroller of the Currency has a slight reservation concerning the House amendment, but that this is not held too strongly by him, and that he is willing to accept the House bill and believes it will be workable.

I hope the Senate will support the motion of the Senator from Arkansas.

Mr. Dirksen. Mr. President, did the Senator from New York [Mr. Javits] want time?

Mr. Javits. I have concluded my remarks on the subject. I thank the Senator.

Mr. Dirksen. Then, Mr. President, I yield back the remainder of my time.

Mr. Johnson of Texas. Mr. President, I ask unanimous consent that a statement by me in connection with the motion of the Senator from Arkansas be printed at this point in the Record.

There being no objection, the statement was ordered to be printed in the Record, as follows:

"Statement by Senator Johnson of Texas

"The action of the Senate in approving the House amendments to S. 1062, and sending the bill on to the President for his approval, is an event which deserves comment. The Congress, the Senate, the Senate Banking and Currency Committee, its chairman, Senator Robertson, and its former chairmen, Senator Fulbright, and Senator Capehart, all should be congratulated and complimented for this significant piece of legislation.

"This bill establishes uniform and clear standards, including both banking and competitive factors, for the consideration of proposed bank mergers. It eliminates a number of gaps in the statutory framework, which now permit many bank mergers to occur with no review by any Federal agency. It provides for a thorough review by the appropriate Federal bank supervisory agency, under these comprehensive standards, and with the benefit of any information which may be supplied by the Department of Justice in the report required from them, of the bank mergers by asset acquisitions and other means which are now and will continue to be exempt from the antimerger provisions of section 7 of the Clayton Antitrust Act.

"It has been a slow and arduous task to bring this legislation to this present stage. In the 84th Congress, in 1956 Senator Fulbright introduced S. 3911. This passed the Senate, but it died in the House. In the 85th Congress, in 1957, Senator Robertson introduced a comparable provision as part of his major financial institutions bill, S. 1451. This passed the Senate, but again the bill died in the House. S. 1062 was introduced in the 86th Congress, in 1959, by Senator Robertson on behalf of himself and Senators Fulbright and Capehart. This was amended by the Senate Banking and Currency Committee. It was passed by the Senate with a further amendment on May 14, 1959, almost a year ago. This time the House did not allow it to die. After holding hearings and after further amending the bill, the House, on April 4, of this year, finally passed the Senate bill. And the Senate has now accepted the House amendments, which clarify but do not change the substance of the Senate bill.

"This long process tries the temper of those who must suffer under it. But in my judgment the repeated improvements in S. 1062, in the course of this slow process, show the real merits, the real benefits, of the legislative process at its best.

"Again, I want to express my congratulations to Senator Robertson and Senator Fulbright, and Senator Capehart and the other members of the Banking and Currency Committee for the persistence and the thoroughness and the statesmanship which they have displayed in carrying this matter through to a satisfactory conclusion."

The Presiding Officer. The question is on agreeing to the motion of the Senator from Arkansas that the Senate concur in the amendment of the House.

The motion was agreed to.

Mr. Johnson of Texas. Mr. President, I move that the Senate reconsider the vote by which the amendment of the House was agreed to.

Mr. Dirksen. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

[From Congressional Record, May 9, 1960]

Bank Merger Legislation

Mr. Robertson. Mr. President, I ask unanimous consent to have printed in the Record at this point a statement in which I commend, during my unavoidable absence from the Senate last Friday, the work of the Senator from Arkansas [Mr. Fulbright] and other members of the Committee on Banking and Currency in calling up and securing concurrence in the action of the House of Representatives on the bank merger bill, which had been pending before the Senate on and off for the last 5 years.

There being no objection, the statement was ordered to be printed in the Record, as follows:

"Statement by Senator Robertson

"Last Friday the Senator from Arkansas [Mr. Fulbright] was kind enough to bring up for me S. 1062, the bank merger bill, and the Senate accepted the House amendments and sent the bill on to the President for his signature.

"I appreciate the kindness of the Senator from Arkansas in doing this. I am glad that he had the opportunity to present this bill to the Senate, because it is a subject in which he has had great interest, going as far back as 1956, when he introduced S. 3911.

"I should like to make it clear in the Record that I am in entire accord with the views expressed by the Senator from Arkansas in urging the Senate to adopt the House amendments, and I agree entirely with his statement to the Senate of the effect and meaning of the amended bill. I also want to make it clear that the answers to the questions posed by the Senators from Utah, Mr. Bennett, and New York, Mr. Javits, which have been printed in the Record express my views in response to those questions. The Senator from Utah, Mr. Bennett, and the Senator from New York, Mr. Javits, have, through these questions, made a contribution to the proper understanding of the bill, both in the Senate at the time of its passage, and in the banking agencies which will be administering the act when it becomes law.

"Other members of the committee, too, especially Senator Frear and Senator Bush, have been most helpful in connection with this bill, and I should like to thank them also.

"I appreciate particularly the kind words of the majority leader in connection with the passage of S. 1062. He did not underestimate the delays and difficulties which this legislation has met, and I am glad that he is able to take satisfaction in the final passage of the bill."

May 28, 1965.

[From the Congressional Record, July 20, 1961]

BANK MERGERS

Mr. ROBERTSON. Mr. President, I should like to make a few comments on a statement which Gov. J. L. Robertson, of the Board of Governors of the Federal Reserve System, made to the Michigan Bankers Association on June 23 of this year.

Governor Robertson's speech contains a very interesting discussion of the problems involved in bank mergers. However, it contains one point which is subject to question and which might lead to serious misunderstanding if allowed to pass without comment or criticism.

In his remarks, Governor Robertson discussed the Bank Merger Act of 1960 and pointed out that it requires a Federal supervisory agency reviewing a proposal for a bank merger to consider seven factors set forth in the statute. Six of these factors relate to banking questions—the so-called banking factors. The seventh factor which must be considered is the effect of the merger on "competition including any tendency toward monopoly." Under the act the supervisory agency considering a merger must get the comments of the Attorney General and the other two supervisory agencies on the competitive factors involved in the merger. Under the act the agency must then take all seven factors into account in making up its mind whether to approve or disapprove the proposal.

It is entirely clear that under the Bank Merger Act the seventh factor—the effect of the merger on competition—is not controlling in the decision of the supervisory agency, and that the views of the other agencies and the Attorney General on the competitive factors are not controlling. In addition to many statements to this effect, these issues were in substance involved in the O'Mahoney amendment when the bill was before the Senate in 1959. This amendment would in effect have given the Attorney General a veto over mergers. After thorough discussion of all aspects of the matter, the Senate defeated the O'Mahoney amendment 55 to 29.

As I read Governor Robertson's statement, he does not question this interpretation of the Bank Merger Act. However, he goes on to make the flat statement that "Congress has enacted antitrust laws which apply to banking despite its status as a 'regulated industry.' " I assume by "antitrust laws" Governor Robertson refers to the Sherman Act of 1890, and the Clayton Act of 1914, particularly section 7 of the Clayton Act and the 1950 amendment to section 7. Governor Robertson stated this position even more fully when he said:

"In contrast to the situation in other regulated industries, Congress has decided that bank mergers should be subject not only to the jurisdiction of the banking supervisory agencies but also to the jurisdiction of the Department of Justice and the Federal courts under the antitrust laws."

These are the statements which I cannot allow to pass without comment.

I think Governor Robertson is premature when he states that these laws apply to bank mergers. In his statement submitted to the Banking and Currency

Committee in 1959, Governor Robertson said that "although the Sherman Act legally applies to bank mergers, that act has never been utilized in this field."

This question is now pending before the U.S. district court in Philadelphia. Until this case is concluded by a decision of the Supreme Court, we will not know whether the Supreme Court will rule that the Sherman Act or section 7 of the Clayton Act applies to bank mergers.

I recognize that there is a fairly widespread assumption that the Supreme Court will hold that the Sherman Act applies to bank mergers. However, I am by no means sure that this assumption is justified. On the contrary, I think there is very good reason for believing that the Supreme Court will not so rule.

The assumption that the Supreme Court will hold that bank mergers are subject to the Sherman Act is, I think, based upon the Supreme Court's decision in *U.S.* v. *Southeastern Underwriters Association* in 1944 (322 U.S. 533). There four Justices of the Supreme Court held, contrary to 75 years of precedent, that insurance was commerce and that, since the Sherman Act applied to commerce, it applied to insurance.

Mr. Justice Frankfurter's terse dissenting opinion explains the weakness of this decision:

"I join in the opinion of the Chief Justice.

"The relations of the insurance business to national commerce and finance, I have no doubt, afford constitutional authority for appropriate regulation by Congress of the business of insurance, certainly not to a less extent than congressional regulation touching agriculture. But the opinion of the Chief Justice leaves me equally without doubt that by the enactment of the Sherman Act in 1890, Congress did not mean to disregard the then accepted conception of the constitutional basis for the regulation of the insurance business. And the evidence is overwhelming that the inapplicability of the Sherman Act, in its contemporaneous setting, to insurance transactions such as those charged by this indictment has been confirmed and not modified by congressional attitude and action in the intervening 50 years. There is no congressional warrant therefore for bringing about the far-reaching dislocations which the opinions of the Chief Justice and Mr. Justice Jackson adumbrate."

This decision shocked the legal profession. It also shocked the Congress which, within a year, passed the McCarran-Ferguson Act of 1945 (15 U.S.C. 1011), to restore the jurisdiction of the States over insurance. A full discussion of this case and a penetrating analysis of the majority opinion are contained in an article by the late Thomas Reed Powell in the September 1944 Harvard Law Review. Powell's concluding comments deserve repeating here:

"When a judge with the neat intellectual skill of Mr. Justice Black proves lame and peccable in reasoning, it is an argument pro homine rather than ad hominem to suggest that the trouble lies in the illegitimacy of the design. It is hardly necessary to add that detailed consideration of the opinion in no way mollifies the shock to the profession when the result of the decision was announced."

The line of precedents holding that banking is not commerce, beginning with *Nathan* v. *Louisiana* in 1850, is even longer than the line dealing with insurance. It was pointed out at the time the Bank Merger Act was up for final passage in the Senate in May of 1960, that the 51st Congress, which passed the Sherman Act, including particularly Senator John Sherman, the former Secretary of the Treasury for whom the act was named, and every other lawyer in the Congress, could not have expected or intended that banking would be covered by an act applicable to interstate commerce.

The Supreme Court can write banking into the Sherman Act just as its predecessors wrote insurance into that act. But I trust that if the Court does so, it will at least not make the pretense that it is following the will of Congress.

It seems to me the Supreme Court might well follow the precedent established in the baseball cases rather than the insurance precedent. In 1922, the Supreme Court held that big league baseball was not subject to the Sherman Act or the Clayton Act. In 1953 the matter was presented to the Court again in *Toolson* v. *New York Yankees, Inc.* (346 U.S. 356). The Court refused to reopen the earlier decision. It took the position that if there was to be a reversal of 30 years of practice under statutes, this reversal of statutory construction should be effected by the Congress and not by the courts.

And even if the Supreme Court should hold that the Sherman Act applies to bank mergers, the rule of reason spelled out in the *Standard Oil* case would presumably be applied. To state this as a question, should a bank merger, which had been approved under the Bank Merger Act by a bank supervisory agency as being in the public interest, be rejected by the Supreme Court on the ground that it would "unduly diminish competition?"

I understand that in the *Philadelphia* case it is urged that section 7 of the Clayton Act applies to bank mergers. I assume Governor Robertson includes section 7 as one of the antitrust laws applying to bank mergers. This is a novel thought. All the testimony on the subject during the consideration of the Bank Merger Act was to the effect that section 7 did not apply to bank mergers, which are virtually never effected by stock acquisition. Among those who took this view were Judge Barnes in 1956, Attorney General Brownell and Judge Hansen in 1957, Deputy Attorney General Walsh and Governor J. L. Robertson of the Federal Reserve Board in 1959, and Acting Assistant Attorney General Bicks in 1960. Conceivably the Supreme Court will rule the other way, but again, I do not think that Congress intended or expected this result.

Governor Robertson concludes by expressing the view that the current litigation will not resolve the administrative schizophrenia in the field of bank mergers. In his opinion, further legislation will be needed.

I cannot agree. I think that the Bank Merger Act of 1960 is good legislation and that it is all the legislation needed in the field of bank mergers. This does not necessarily mean I agree with every decision reached by the bank supervisory agencies under the act or that I would agree if I knew all the facts in each case. Certainly in such a field as this there is room for differences of opinion as to the application of the statutory principles to the particular facts of each case. We knew when we wrote the act that we were leaving wide discretion to the informed judgment of responsible and capable experts. And we knew that if the Bank Merger Act had become law in 1956, when we first reported it from the Banking and Currency Committee, before the vast wave of bank mergers which occurred in 1957, 1958, 1959, and early 1960, the task of administering the bill would have been far easier.

I am convinced the Bank Merger Act of 1960 is a sound and well-considered statute. I think it provides sound and carefully designed procedures and standards in a field where such procedures and standards were badly needed.

Instead of trying to get the courts to rewrite the antitrust laws and the Bank Merger Act, and instead of trying to get Congress to amend the Bank Merger Act, I think the bank supervisory agencies should be given a real opportunity to administer the Bank Merger Act as the Congress wrote it.

Because Governor Robertson's speech contains much information about bank mergers and a very informative discussion of the problems involved in them and also in order to give his full statement on the points where I disagree with him, I ask unanimous consent that it be printed in the Record following my remarks.

I should like to add that throughout the years, first, when he was serving in the Office of the Comptroller General, and later as an outstanding member of the Federal Reserve Board, Governor Robertson has been my close friend.

There being no objection, the address was ordered to be printed in the Record, as follows:

"REMARKS OF J. L. ROBERTSON, MEMBER OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BEFORE THE 75TH ANNUAL CONVENTION OF THE MICHIGAN BANKERS ASSOCIATION, MACKINAC ISLAND, MICH., JUNE 23, 1961

"BANK MERGERS IN PERSPECTIVE

"Let me begin by speaking as if I were one who is unalterably opposed to bank mergers: Since I was born—a half-century ago, give or take a few years—the population of the United States has about doubled. Economic growth has been even greater. Gross national product has increased five-fold. The amount of money in circulation today is more than 10 times what it was. And the total resources of the American banking system have risen from $22 billion to almost $300 billion. But what has happened to our banking system, structurally? In 1920 our country had over 30,000 banks; today we have less than half that number. Every year hundreds of sound and serviceable independent banks disappear, having been absorbed by bigger institutions. Can anyone doubt, in the face of these facts, that the American banker is moving away from the free and open competitive system that has helped the country achieve its miracles of production, distribution, and general prosperity?

"Now I must change the pitch—in both voice and substance—and talk like somebody else, one of those who seem to think that bank mergers are our only salvation. The question now becomes: How did our country ever achieve so much with such an antiquated banking system, and how much longer can we afford to pay the high price for this outmoded arrangement? When the national

banking system was established a century ago, perhaps a banking structure composed of thousands of small institutions was necessary. Since that time the population of our country has changed from overwhelmingly rural to overwhelmingly urban. When we cut the pattern of our banking system there were no such things as the telephone, the automobile, or paved roads. Developments such as these should have obliterated the individual smalltown bank, just as they did the local independent telephone system that served my hometown, Broken Bow, when I was a boy.

"Germany, France, Canada, Japan, England, Italy—countries that are now challenging our economic preeminence—each has a streamlined banking system in which from 3 to 11 vigorously competing nationwide banks control the bulk of the commercial banking resources of the country and are geared to serve nationwide industry both at home and abroad. A country as rich as ours perhaps could afford the luxury of having several times as many banks as the rest of the world combined, were it not that the iron law of relative efficiency is making the small unit bank more and more of an anachronism. The constantly increasing complexity of banking problems, the greater scope that larger organizations can offer promising young men, the advantages of electronic accounting that can be afforded only by institutions with tens of thousands of customers—all make it increasingly clear that the small local unit bank has outlived its place in our economy.

"There you are. I have tried to speak the part, successively, of those who feel that the bank merger movement, unless arrested right now, will spell the doom of the free enterprise system, and those who contend that people who oppose bank mergers and cling to unit banking today are like those who opposed the internal combustion engine in 1911 and stood firmly behind the horse.

"But let me warn you, the impressive generalities on both sides must be analyzed with plenty of skepticism. For example, a few minutes ago, without speaking a word of untruth, I gave you a completely false impression by failing to mention certain additional facts and by juxtaposing facts that had no valid relationship to each other. It is true that we had 30,000 banks and now have less than 15,000; it is also literally true that hundreds of independent banks disappear through merger every year. But the overwhelming majority of the thousands of banks that are no more, disappeared not as a part of the modern merger movement but simply because they became insolvent during the banking trouble of 30 years ago.

"And look at some of the arguments I made in favor of mergers. I attempted to wring your hearts by conjuring up a picture of thousands of small, inefficient banks in which feeble octogenarians were making shaky entries in handwritten ledgers, trying to put off for a few more years the inevitable liquidation. But such banks are figments, as we all know. I made no mention of the real problem of mergers among large banks fully able to afford and utilize electronic accounting and with no management succession problems. And most important, I carefully avoided any reference to the conviction of many economists that by reducing the number of competing banks in a market area we inevitably reduce also the vigor of banking competition and the general benefits to the economy that result from competition.

"Well, so much for the need for skepticism; I may have spent too long on a point that preoccupies me more from year to year—the fact that truth is a most elusive commodity. What I hope to do this morning is to marshal, in perspective, a few relevant truths, so that when we do reach conclusions on the bank merger problem, they will be realistic evaluations rather than a hodgepodge of emotional generalities.

"Why do banks merge? In the early thirties, which is as far back as my banking memory extends, most mergers were rescue operations. A relatively strong bank absorbed a weak bank to save it from receivership or liquidation. But since the Second World War most mergers have taken place for quite different reasons. A small family-owned bank may merge with another because the president is old and has no sons willing or able to carry on. Or he may wish to obtain the more marketable stock of a larger bank. Promising young bankers may prefer the supposedly greater opportunities of an assistant vice presidency in a metropolitan bank to the presidency of a smalltown bank, or a large bank may want to obtain the services of the president of another large bank through the merger route—this is what is meant by the mouth-filling phrase 'problems of management succession.'

"Often the initiative comes from the larger bank, the one that is absorbing the other (to judge by the size of premiums being paid for banks these days). Sometimes, I suspect, the motive is unadulterated megalomania or foolish rivalry—

the driving desire to be the largest bank in the city or State, not the second largest: or even a thirst for power for the sake of power.

"When two relatively large banks in the same city wish to merge, they sometimes emphasize the growing importance of nationwide banking competition—the need to be able to compete with banks in New York, Chicago, and San Francisco, for example, for the deposits and loans of enormous national corporations that cannot be adequately served, we are told, by banks with only a half billion dollars of resources.

"We are all acquainted with the 'flight to the suburbs' in metropolitan areas, a flight residential, mercantile, and industrial. Banks stress the need to 'follow their customers' away from the business district of the city; and often, we are told, it is safer and cheaper to 'branch' an independent suburban or smalltown bank than to create what we supervisors barbarously call a de novo branch.

"In very recent years electronic accounting is mentioned more and more frequently as a reason for merging. We are sometimes told that a $20 million bank, for example, cannot efficiently utilize any but the smallest of the marvelous devices we see advertised in Banking, but that if two or three such banks merge, they can afford to buy and fully utilize full-scale equipment, to the benefit of the banks' stockholders, their customers, and the American economy.

"These are some of the reasons—but only some—that are advanced to justify the hundreds of merger proposals we see every year. It would be fruitless to evaluate them generally, for they must be related to the facts of specific cases. Each of these reasons can be very appealing—especially to the superficial observer. Why should an elderly banker, who has spent a lifetime building a successful institution, be forbidden to reap the benefits of hard work and good judgment by 'selling' the bank in such a way as to promote the welfare of his family? Who would oppose an arrangement under which several small banks can give superior service to customers and better returns to stockholders, while releasing manpower for other productive use? What valid objection is there to a city bank expanding geographically in order to continue to serve its entire growing metropolitan area?

"The chief objection, of course, is the characteristically American notion embodied in such hackneyed but meaningful expressions as 'the free enterprise system,' 'freedom of competition,' and the like. Unlike most other countries, the United States has adopted as national policy the principle, to put it broadly and without a great many necessary qualifications, that our people will be better off, in the long run, if most areas of our economy are cultivated by a relatively large number of vigorously competing enterprises. Some observers consider this policy especially important in banking; they regard financial concentration as singularly evil because, in addition to its immediate ill effects, it tends to spawn concentration and monopoly throughout the economy.

"The American banking system of thousands of independent unit banks, in cities, towns, and villages, developed from the special conditions that existed here during the 19th century. There was an enormous country, a constantly advancing frontier, a vigorous pioneering spirit; and the technological revolution exemplified by the assembly line lay in the future. Ninteenth-century America needed banks, not only to serve, as now, to lubricate a massive economic machine—but, more important at that time, to provide the capital that was absolutely essential for the Nation's development. I think it was Preston Delano, an outstanding Comptroller of the Currency, and long my revered mentor, who remarked to me years ago that the West was built on the bones of broken banks.

"But different epochs have different needs. It is unreasonable to regard the development of branch banking and group banking in the 20th century as an accident. Besides being a nation on wheels, rolling over an incomparable network of good roads, the American people are uniquely a banking people. With far less than a tenth of the world's population, we probably have more checking accounts than the rest of the world put together. And this simple fact is one of the many reasons for the growth of multiple-office banking: the bulk of bank customers are no longer business enterprises located downtown.

"Unless we wish to impede seriously our economic progress, we must bow to change and reality, exemplified in such developments as these. And, to a great extent, we have acknowledged the force of changed circumstances. The unprecedented growth of branch banking attests to this. In 1951 our country had less than 20,000 banking offices; today we have nearly 25,000.

"The crucial question is where we should strike the balance between the sometimes opposing forces of convenience, efficiency, and economy on the one side, and the less tangible long-term values of 'free enterprise,' 'individual initiative,' and 'vigorous competition' on the other.

"Under our governmental system, such conflicts of opposing interests—opposing benefits and detriments—are dealt with, for better or worse, by the people's representatives in government—the legislative, executive, and judicial branches, all three. In our system of government, the complexity of this process is multiplied by the fact that we have both sovereign States and a sovereign Federal Government, often with responsibilities and powers in the same areas of activity.

"Each of the 50 States has banking laws and a bank supervisory system. The Federal Government has at least three. In addition, Congress has enacted antitrust laws, which apply to banking despite its status as a regulated industry.

"Bank mergers have been permissible for many years under both Federal and State laws, but these earlier laws seldom enumerate standards or objectives that should guide supervisors in permitting or prohibiting mergers. In those far-off days the supervisor's main concern was whether the continuing bank would be a sound and serviceable institution. The possible effect on banking competition was a secondary consideration.

"Within the past decade the bank merger problem, in capital letters, has become a major problem—to legislators, administrators, and the public—for the first time. In 1956 Congress enacted a law to control the future expansion of bank holding companies, and in 1960 a law that, broadly speaking, requires the approval of one of the three Federal supervisory agencies as a prerequisite to any bank merger. A number of States also have enacted laws that parallel, to a considerable extent, the philosophy embodied in the Federal legislation.

"The Bank Merger Act of 1960 for the first time enumerated factors that Federal supervisors must take into consideration in passing upon proposed mergers. The ultimate test is embodied in the statutory provision that the Comptroller, the Board of Governors, or the Federal Deposit Insurance Corporation, as the case may be, shall not approve a proposed merger unless, after considering all factors, it finds the transaction to be in the public interest.

"Seven factors are enumerated in the Bank Merger Act. The first six—often called the banking factors—are concerned with the quality of assets, adequacy of capital, competence of management, earnings prospects, and the convenience and needs of the community to be served. Is one of the banks in a weakened condition; is this a rescue operation? Or has it mediocre and unaggressive management, so that its community is not being adequately served? Or is its only executive officer an elderly man, running a bank that cannot afford to replace him at today's salaries? Or, on the contrary, are both banks well managed, serviceable, and with promising futures, so that there is no 'banking need' for the merger? These are a few of the questions that we ask ourselves.

"The seventh factor named in the Bank Merger Act is the sign of the times. It deals with the effect that the merger will have 'on competition (including any tendency toward monopoly).' Those are the words of the statute; could anything be simpler and more straightforward? As the Senate committee that considered the Merger Act pointed out in its report, competition is 'an indispensable element in a sound banking system.'

"It is only the application of these seven factors to actual cases—the weighing of the favorable and unfavorable aspects of a merger proposal—that is steadily increasing the consumption of tranquilizers by bank supervisory officials.

"Occasionally a situation arises in which there is no practical alternative to merger—where, for one of the reasons I have suggested, a bank must either merge with another or go out of existence and deprive its community of needed services. However, the usual case is quite otherwise. There are, let us say, four banks in a small city. All are doing reasonably well, are well managed, and face no serious problems. The second largest and the smallest wish to merge. If the merger is permitted, it is contended, substantial economies and heightened efficiency will result, additional services will be offered to the banks' customers, and the combined bank will be better able to compete with the city's largest bank.

"On the other hand, the banking public of the city, of course, would thereafter have only three alternative competing sources of banking services, both on the deposit and loan sides. That is to say, as a matter of arithmetic, the number of competing banks will drop from four to three. And it is clear from the words of the statute, read in the light of its legislative history, that if the proposed merger would lessen competition, it should not be approved unless the favorable aspects of other factors clearly outweigh the adverse competitive factor to the extent that the public interest would be promoted by approval.

"Just for exercise, I wish each of you would try to decide whether the amalgamation of a certain pair of banks in some four-bank city with which you are familiar would actually increase or lessen competition, and to what extent.

And after you have resolved that preliminary question—perhaps by deciding, as we often must, that 'competition will be lessened, but it is hard to say how much'—then go on and weigh this imponderable against the benefits you guess may flow from the merger—to both the public and the banks. (But, for the purposes of this exercise, you need not bother weighing any possible benefits secretly offered to bank officers for persuading unsuspecting stockholders to vote for the merger.)

"I hope each of you will run through this process, however briefly, with a real situation (other than your own) in mind, because it will increase your tolerance toward the apparent shortcomings of supervisory decisions regarding bank mergers. We are acutely aware of these shortcomings, and we can only fervently hope that after a few more years' experience we—or our successors—will see through the merger glass a trifle less darkly.

"As most of you know, during the past year bankers intent on consummating mergers have encountered serious difficulties quite apart from the apparent inability of some supervisors to make up their minds—either expeditiously, or consistently, or clearly. When State banks that are members of the Federal Reserve System, for example, propose to consolidate, it must seem to them that the course is set up like a hurdle race. with the hurdles higher and higher as they approach the finish line. Under State law, the banking commissioner must be persuaded to give his approval. After that obstacle has been surmounted, the awesome Federal Reserve System looms ahead. The Reserve bank of the district investigates the proposal minutely, and then the Federal Reserve Board must decide whether the merger would be in the public interest.

"On occasion, the Reserve Board concludes that a merger would not be in the public interest, after the State supervisor has reached the contrary conclusion. This is hard to take, I am sure, but most bankers have come to accept this risk as unavoidable, in a Federal system like ours. More painful is the recent experience of certain bankers who successfully ran the gauntlet of bank supervisors, only to be challenged by the Department of Justice under the antitrust laws. These people, I am afraid, are certain that this is bureaucratic muddling run riot.

"I was a lawyer before I was so unwise as to become an administrator, and as a lawyer I can say that, under the presently governing Federal statutes, there seems to be no escape from this dilemma—the possibility, now an actuality, that a proposed merger is subject to the jurisdiction of coordinate departments of the Federal Government and that while one says 'Go ahead' the other may say 'Verboten.' In contrast to the situation in other regulated industries, Congress has decided that bank mergers should be subject not only to the jurisdiction of the bank supervisory agencies but also to the jurisdiction of the Department of Justice and the Federal courts under the antitrust laws.

"To be painfully logical, the fact that the Comptroller of the Currency concludes that the merger of two Philadelphia banks would be 'in the public interest' and the Department of Justice wants to enjoin the merger under the Sherman Act does not mean that the two have reached conflicting conclusions. Under the antitrust laws, the only tests are whether a transaction tends to lessen competition or is what the law considers an attempt to monopolize. Even if the transaction admittedly would be in the public interest for other reasons, the antitrust laws may prohibit it, and it is the explicit duty of the Department of Justice to enforce those laws.

"On the other hand, it is perfectly clear, under the Bank Merger Act, that the effect of a merger on competition is only one of the several factors that the bank supervisors must consider. If the FDIC, let us say, finds that a proposed merger will contribute so greatly to the convenience of a community as to outweigh the the lessening of competition, from the public interest viewpoint, the FDIC is not only authorized, it is obligated to approve—and promptly—even though other Federal agencies may have recommended adversely on the competitive factor. In short, the Department of Justice and the FDIC might assure each other: 'You are absolutely right,' and yet the one would say 'Yes' and the other would try to persuade the courts to say 'No' to the same merger proposal.

"To many people, this is an intolerable situation. They believe that if Congress considers the Federal Reserve Board, for example, competent to decide whether a merger is 'in the public interest' when all factors are considered, this should settle the matter, and the merger should not be blocked solely on account of competitive considerations that already have been taken into account by the Board and found to be outweighed by the public-interest benefits.

"Others are convinced, and not without reason, that so long as we have multiple banking systems and multiple supervisors, with differing philosophies, we will have conflicting, contradictory, and inconsistent administrative decisions. Hence,

they believe that applicability of the antitrust laws is essential if we are to avoid chaos or general disintegration of standards in the maintenance of banking competition.

"There are some who hope that the courts' decisions in the pending antitrust suits regarding the Philadelphia and Lexington mergers will settle this aspect of the problem. Despite my optimistic temperament, I doubt that it can be settled otherwise than by legislation. But the litigation will have served a worthy purpose if it does no more than give bank supervisors a better concept of the relative importance of competition in deciding whether a proposed merger would promote the public interest.

"In the meantime, we must deal with the merger problem as it is, under existing law. The problem, like most problems that amount to anything, is not susceptible of pat solution. It has already been enlarged and distorted, chiefly due to the absence of sufficient skepticism in analyzing the positions of people who claim that all the valid arguments are on their side.

"It is my hope that all of us will profit from the sometimes painful experiences of the past year, and, that the banking industry, bank supervisors, and Congress will succeed in working out improved procedures that will regulate bank mergers in ways that will be truly in the public interest. This problem can be solved if we utilize all our resources of information and intelligence, perseverance, and perspective to deal with it as one phase of our continuing effort to maintain a progressive and competitive banking system that is able and willing to meet the needs of a dynamic and expanding economy."

[From the Congressional Record, July 28, 1961]

Applicability of Antitrust Laws to Bank Mergers

Mr. Robertson. Mr. President, on July 20 I placed in the Congressional Record a speech made by Governor Robertson of the Federal Reserve Board at the Michigan Bankers Association meeting on June 23 of this year, after making a few comments in order to express my disagreement with some of Governor Robertson's views. Since that time I have received from Governor Robertson a letter on the subject of my comments on his speech, and I have written him in reply to his letter. I ask unanimous consent to have the letters printed in the Record.

There being no objection, the letters were ordered to be printed in the Record, as follows:

Board of Governors of the
Federal Reserve System,
Washington, D.C., July 24, 1961.

Hon. A. Willis Robertson,
U.S. Senate, Washington, D.C.

My Dear Senator: In the Senate last Thursday you commented upon my recent remarks before the annual convention of the Michigan Bankers Association. Your comments were directed particularly to the relationship of the antitrust laws to bank mergers. In view of the importance of this problem and the liklihood that it will be with us for some time, clarification seems to be advisable, especially regarding my own views.

In your comments you quoted this sentence from my speech:

"In contrast to the situation in other regulated industries, Congress has decided that bank mergers should be subject not only to the jurisdiction of the bank supervisory agencies but also to the jurisdiction of the Department of Justice and the Federal courts under the antitrust laws."

You said: "These are the statements which I cannot allow to pass without comment" and "I am by no means sure that this assumption [that the Sherman Act applies to bank mergers] is justified."

It is entirely true, as you pointed out, that the U.S. Supreme Court has never ruled on whether the Sherman Act applies to bank mergers. However, until now I had always understood that you and I (among many others) were in agreement that the Sherman Act is applicable in this field.

The report of the Senate Committee on Banking and Currency on the bank merger bill (S. Rept. No. 196, 86th Cong.), which you submitted April 17, 1959, stated that:

"It is now generally accepted that these sections [secs. 1 and 2 of the Sherman Antitrust Act] apply to bank mergers and consolidations by either stock or asset acquisitions."

The report of the House Committee on Banking and Currency (H. Rept. No. 1416, 86th Cong.) also stated that "the Sherman Act applies to asset acquisitions as well as to stock acquisitions," but added that "it has been of little use in controlling bank mergers. It has been used only once in court (in a proceeding initiated in March 1959) against a bank merger."

The question also arose when the bank merger bill was before the Senate, and during the debate it was brought out several times that bank mergers would continue to be subject to the Sherman Act if S. 1062 was enacted. For example, during the debate on May 14, 1959, you said:

"I ask Senators to look at page 3 of the report. * * * We have tried to cover all the questions which we thought would arise.

"On page 3 the report states:

" 'S. 1062 would not affect in any way the applicability of the Sherman Act to bank mergers or consolidations.'

"It will not affect that act in the least. If banks have actually violated the antitrust laws, they can still be prosecuted under the Sherman Act."

In the course of your comments last Thursday you said: "I assume Governor Robertson includes section 7 [of the Clayton Act] as one of the antitrust laws applying to bank mergers." I sincerely hope my remarks before the Michigan Bankers Association did not create that impression or warrant such an assumption, because it would be just the opposite of my actual opinion on this subject. As you pointed out in your comments, I testified, during the hearings on the Bank Merger Act itself, that section 7 of the Clayton Act is not applicable to bank mergers. My views in this matter have not changed.

I should like to mention one other point you made in the course of your comments regarding the effect of the pending Philadelphia and Lexington antitrust suits. On this subject the thought I intended to convey was that, if it is undesirable for bank mergers to be subject both to the Bank Merger Act and the Sherman Antitrust Act, the situation will not be corrected bv the judicial decisions in those cases—it could be changed only by congressional action. There can be no dispute about this if, as you and I have both said, the Sherman Act is applicable to bank mergers.

Over the years, you and I have generally had a clear understanding of each other's views on the subject of bank mergers, and I believe that our principles and legal opinions rarely have failed to coincide. Consequently, I hope this letter will clarify my position to your satisfaction, and, in case you see fit to insert it in the Congressional Record, to the satisfaction of any others who may have been misled by the manner in which I stated my views.

Sincerely,

——— ———

U.S. SENATE,
COMMITTEE ON BANKING AND CURRENCY,
July 26, 1961.

HON. JAMES LOUIS ROBERTSON,
Board of Governors of the Federal Reserve System,
Washington, D.C.

DEAR GOVERNOR ROBERTSON: I have received your letter commenting on my remarks on your speech before the Michigan Bankers Association on the relationship of the antitrust laws to bank mergers.

I agree with you that it was generally assumed, at the time the Bank Merger Act was being considered, that the Sherman Act applied to bank mergers. I think it is clear that this was merely an assumption based primarily on the *Southeastern Underwriters* case dealing with insurance and reversing almost 70 years of practice in the field of insurance. Mr. Berle's article in 49 Columbia Law Review, which was cited in the report of April 17, 1959, on this point and quoted at page 18 of the report, makes this clear. This assumption was also specifically questioned by Senator Fulbright at the time of final passage of the bill in the Senate on May 6, 1960 (vol. 106, Congressional Record, pt. 8, p. 9711).

I think you will agree that there was no real consideration of this assumption at the time the Bank Merger Act was being considered, partly because it was universally recognized that in the 70 years since its enactment the Sherman Act had proved entirely ineffective to control bank mergers and partly because the Bank Merger Act did not create any exemption for bank mergers from the Sherman Act. Aside from making these points clear, discussion of the Sherman Act was irrelevant to the consideration of the Bank Merger Act. It was expected

that the Bank Merger Act would be the controlling law on the subject, though no effort was made to waive any application which the Sherman Act might possibly be found to have.

The suit by the Justice Department under the Sherman and Clayton Acts to enjoin a merger approved under the Bank Merger Act puts to the test the assumptions made during the consideration of the latter act.

I am glad to find that you and I are in full agreement that section 7 of the Clayton Act does not apply to bank mergers. I should find it hard to see any real significance in the Bank Merger Act if the stringent standards of section 7 should be applied to bank mergers.

The issue which I intended to raise in my remarks on your speech is simply whether the general assumption at the time the Bank Merger Act was being considered—the assumption that the Sherman Act applies to bank mergers—will be borne out by the courts in the pending suit.

On examination of the question, it seems to me that there is substantial reason to question this assumption, and substantial reason to expect that the Supreme Court, consistent with the precedent established in the two baseball cases, would reach the conclusion that the Sherman Act of 1890 was not intended or expected to apply to the field of banking, and would therefore not apply that act to a bank merger.

If the Court should reach this decision, and hold that bank mergers are not subject to the Sherman Act, this would necessarily mean that bank mergers would not be subject both to the Sherman Act and the Bank Merger Act. This would obviate the conflict between statutes, the conflict between agencies, which you fear would make additional legislation necessary.

In my judgment this would be a most satisfactory result. I think the bank supervisory agencies, with the help of the comments of the Department of Justice on the competitive factors involved in bank mergers, are best qualified to determine the desirability of proposed bank mergers, from the point of view of both the banking factors and the competitive factors involved in bank mergers.

I am glad to have had this opportunity to go into this question more fully and more directly with you. I trust that our exchange of views has proved helpful to us and to others interested in the subject. We are, of course, both making forecasts about the outcome of litigation and, as lawyers, we know the hazards of such forecasts.

With kind regards, I am,

Sincerely yours.

A. WILLIS ROBERTSON, *Chairman.*

Mr. ROBERTSON. Mr. President, in order to clear up some confusion which may have arisen on the application of section 7 of the Clayton Act, I should like to point out that the original section 7 of the Clayton Act applied only to transactions involving stock acquisitions; for example, bank holding companies and the like. It did not apply to transactions accomplished by asset acquisitions. Since bank mergers are virtually always affected by asset acquisition, the original section 7 of the Clayton Act, therefore, had no significance as far as bank mergers were concerned. In 1950, section 7 of the Clayton Act was amended in a number of respects. It was broadened to cover asset acquisitions. However, the 1950 amendment did not broaden the act to cover bank mergers by asset acquisitions. So, since bank mergers are almost invariably affected by asset acquisitions, section 7 of the Clayton Act still has no significance in the case of bank mergers.

Furthermore, the statements made during the discussion of the Bank Merger Act in 1959 and 1960, expressing in one way or another the general assumption that bank mergers were subject to the Sherman Act—for the purpose of explaining that the Bank Merger Act was necessary and did not expressly repeal the Sherman Act with respect to bank mergers—have no significance so far as the interpretation of the Sherman Act of 1890 is concerned. Statements made in Congress in 1959 and 1960 are not a part of the legislative history of an 1890 statute.

I have set forth in my previous remarks and in my letter to Governor Robertson my reasons for thinking that when the Supreme Court considers the applicability of the Sherman Act to bank mergers—for the first time since the enactment of the Sherman Act—they will not follow the precedent of the *Southeastern Underwriters* case, but instead follow what I consider to be the better and more recent precedent established in the baseball cases, where the Court said that it would not change a longstanding interpretation of a statute but would instead leave it to Congress to amend statutes.

[From the Congressional Record, Jan. 30, 1962]

"The Philadelphia Bank Merger" Case

Mr. Robertson. Mr. President, we have all been reading and hearing a great deal in recent weeks and months on the subject of the relation between the antitrust laws and banking, especially bank mergers and the Bank Merger Act of 1960.

One of the most important developments in this field was the decision of Chief Judge Clary of the U.S. District Court for the Eastern District of Pennsylvania, handed down on January 15, 1962, in the case entitled "United States of America against The Philadelphia National Bank and Girard Trust Corn Exchange Bank."

The proposed merger had been approved by the Comptroller of the Currency under the Bank Merger Act. The Justice Department sued for an injunction against the merger, alleging that it violated section 1 of the Sherman Antitrust Act and section 7 of the Clayton Antitrust Act. The judge denied the request for an injunction and dismissed the Justice Department suit.

This is the first decision involving the Bank Merger Act. It is the first decision involving the relation between the Bank Merger Act and the so-called antitrust laws. It is, as far as I am aware, the first decision under the Sherman and Clayton Acts dealing with a bank merger by consolidation, as distinguished from a stock acquisition.

The trial of the case was extensive, and Judge Clary wrote a thorough and comprehensive opinion which I think it is appropriate to call to the attention of the Senate. I should like, in addition, to make a few comments with respect to Judge Clary's decision.

Judge Clary first held that the approval of the merger by the Comptroller under the Bank Merger Act did not preclude a review under the antitrust laws. In other words, he held that the Bank Merger Act did not, in and of itself, supersede the antitrust laws with respect to bank mergers approved under it.

Judge Clary next considered whether section 7 of the Clayton Act applied to a bank merger not accomplished by a stock acquisition, and he held that section 7 was not applicable. This agrees with the position taken by the Banking and Currency Committee on several occasions, including our report on the Bank Merger Act in 1959, and it agrees with the position taken by Judge Barnes in 1956, Attorney General Brownell and Judge Hansen in 1957, Deputy Attorney General Walsh in 1959, and Acting Assistant Attorney General Bicks in 1960.

Judge Clary went on to consider the facts of the merger as explained at the trial before him and considered the application of section 1 of the Sherman Act and section 7 of the Clayton Act—on the assumption that it was applicable. The opinion contains an interesting discussion of the product market or line of commerce and the geographic market or section of the country which must be found for purposes of section 7 of the Clayton Act. Judge Clary also examined the question of competition and the effect of the merger upon competition, and came to the conclusion that there was no reasonable possibility that competition, either in Philadelphia itself or elsewhere in the country, would be lessened or that the merger would tend to create a monopoly in the Philadelphia area.

Accordingly, the complaint was dismissed. I understand that the Justice Department has not yet decided whether to appeal.

Judge Clary did not discuss in the course of his opinion the question which I raised, in the remarks I made on the Senate floor on July 20, 1961—the question whether the Sherman Act is applicable to banking in general or to bank mergers in particular. In view of his decision, it was not, of course, necessary for Judge Clary to take up this point.

In my remarks on July 20, I pointed out that the assumption that the Sherman Act applies to banking and to bank mergers is based on a seven-judge decision in *Southeastern Underwriters Association* case (322 U.S. 533), holding that insurance is subject to the Sherman Act. I pointed out that Mr. Justice Frankfurter dissented, along with Chief Justice Stone and Mr. Justice Jackson, on the ground that in 1890 it was universally considered that insurance was not commerce and therefore the Sherman Act did not apply to insurance. I pointed out that in 1890 every lawyer, including Senator Sherman, knew that banking was not commerce because the Supreme Court had said so in a long line of cases beginning in 1850. I questioned, when a case involving the applicability of the Sherman Act to banking might come before the courts, and eventually before the Supreme Court, whether the courts would follow the four judges who formed the majority in the *Southeastern Underwriters Association* case, or whether they would follow

the views of the three judges who dissented, whose views were in my judgment adopted by the Supreme Court in the Supreme Court's decision in *Toolson* v. *New York Yankees, Inc.* (346 U.S. 356). In that case the Court took the position that if there was to be a reversal of 30 years of practice under the Sherman Act, in effect an amendment to that act, the Congress should make the change and not the Court.

I believe that Judge Clary's opinion in the Philadelphia case is an important landmark in the field of banking law. I believe Senators will want to examine the full opinion carefully in order to know the exact facts and the exact rulings which Judge Clary has made. I ask unanimous consent that a few brief excerpts from the opinion be inserted in the Record at this point.

There being no objection, the excerpts were ordered to be printed in the Record, as follows:

"The Government here has brought an action—the first of its kind—to prevent the merger of two strong Philadelphia banks, and on the ground that this merger will (1) violate the Sherman Act by restraining trade, and (2) violate the Clayton Act by lessening and/or destroying competition and tending toward a monopoly. The Court believes that the Government's general theory of the case should be set out in brief, broad outline before coming to the specifics.

"The Government's case was predicated upon the premise that the banks involved were legally restricted to having offices in geographic limits. Starting with that assumption, the Government introduced a wealth of statistical data, the accuracy of which has not been questioned, which would show that a very large percentage of the deposits and loans originated in the restricted geographical area. Based strictly upon this premise, and applying the principles heretofore enunciated in industrial cases, the Government argues that these percentages are all persuasive, show a high degree of concentration of the market involved, and that it is therefore the duty of the court to prevent this clear, apparent, restraint of trade, destruction of, or restriction of competition, and tendency to monopoly by prohibiting the merger.

"The Court accepts the statistics introduced as showing exactly what they demonstrate on the figures used, but, as will be pointed out later when discussing the specifics, refuses to accept the conclusions which the Government asks the Court to draw.

"In support of its contention that this merger is illegal, the Government attempted to show by the testimony of two university professors that the merger would have a profound adverse effect upon the banking system of this area, actually restrict credit, and permit price fixing for banking services. This attempt was far from successful. The professors had individual theories of the effect of the merger on the monetary system of the United States and of this area, which were completely destroyed on cross-examination, particularly as relating to the Philadelphia situation.

"The Government also attempted to establish, by opinion testimony of small town bankers, that the contemplated merger would adversely affect, not only the banking situation in Philadelphia, but generally throughout the country, including their own small towns. Their testimony was practically a rehash of the testimony they gave before both the House and Senate committees considering the Bank Merger Act of 1960. There they strongly urged the Congress of the United States to forbid further bank mergers and to maintain the status quo of the banking system of the United States. They attempted to have Congress limit prospective mergers to the very narrow situations where economic necessity would make a merger absolutely imperative.

"For example, they conceded that where a bank was on the verge of insolvency, a merger should be permitted with a strong solvent bank for the protection of depositors and the general public. They also agreed that where ineffectual management was demonstrated, again it would be in the public interest to merge the bank with a strong progressive bank, again for protection of depositors and the public. With these two and other minor exceptions, not necessary to outline here, they fought vigorously to have the Congress absolutely forbid all other mergers. This the Congress refused to do, and, in the opinion of this Court, properly so.

"Commercial banking, despite the attempt of the Government in this case to have the Court consider it an ordinary line of commercial endeavor, comparable to the ordinary industrial organizations, is a specialized branch of what the Court chooses to term the financial industry. It is completely regulated. It may not, as an industrial plant might, establish a branch of operations where it pleases. By virtue of both State and Federal authority, it must keep its assets liquid, as will be hereinafter discussed. It may charge for its principal services

(lending of money) a maximum prescribed by law. It may not pay interest on demand deposits and is limited by law to the amounts which it may pay for savings or time deposits. It may not go out and buy raw materials and manufacture products and attempt to extend its market. Its stock in trade is money and the only way that it can generate its stock in trade—money—is to create demand deposits which it may lend to individuals, corporations, or organizations. It is the commercial bank, even though strictly regulated, which comprises the backbone of the monetary system of the United States. To place it in and consider it as part of the commercial and industrial field, as contrasted with the financial, would be to ignore the realities of the situation.

"Both the Government and the defendants have, in support of their respective contentions, cited the only antitrust case law available and all such cases were decided under the Sherman and subsequent acts. All involve only commercial and industrial organizations. While the court recognizes the validity of the broad principles of law therein enunciated, it certainly does not follow that those principles should be applied with the same force and effect to a regulated industry as to one in the so-called free enterprise field. The Congress of the United States has, in fact, in the industrial and commercial field, usually exempted regulated industries from the application of the antitrust law and in the public interest.

"It is significant to note that in the Bank Merger Act, the Congress of the United States has included as one of the controlling elements, and an important one, for consideration in the determination of governmental approval of bank mergers, that same public interest. This court does not believe, as the Government would have it, that this was a mere passing reference without practical significance and actually completely irrelevant to a decision of this case, but, on the contrary, feels that the inclusion of this public interest concept is an important element in the congressional approach to monetary regulation.

* * * * * * *

"In summary, it can be said that although the merger will increase concentration to the percentage figures given, the merged bank would have no power to control the price, and supply of credit, nor could it dominate the market in any manner. And, although a direct substantial competitor will be eliminated, the only competent testimony upon the subject establishes that competition will be more vigorous after the merger. Also, although the commercial banking field is not an easy one to enter, it cannot be concluded that a new bank will not be established in the four-county area in the future. Finally, although the defendants have engaged in prior mergers, these mergers have had valid business purposes as the motivating force.

"Viewing all this collectively, the court can see no reasonable probability that competition among commercial banks in the four-county area will be substantially lessened.

"Moreover, it is difficult to perceive a reasonable probability that this merger will tend to create a monopoly in commercial banking in the four-county area. Certainly, every time one bank in an area is eliminated, the path toward an eventual monopoly or oligopoly is shortened. This can be said for the most insignificant combination. But this does not mean that a monopoly is inevitable.

"Especially is this true in the area of bank mergers. Every future merger in the four-county area will be subject to the close scrutiny of the appropriate State and Federal agency. At some point any trend, if discernible in the future, will be checked. Although some of plaintiff's witnesses, for the most part independent bankers from smaller communities throughout the country, were of the opinion that approval of this merger would trigger others in the four-county area, as well as the remainder of the United States, this court is not prepared to concur. The competitive situation that exists in the four-county area, with the many alternatives available to a prospective customer, leads to the inescapable conclusion that any tendency to monopoly or oligopoly at this stage is nonexistent. What happens in the future must be left to the appropriate Federal banking agency, and, if necessary, to another court at another time. All that is being said is that this particular merger will not tend to create a monopoly.

* * * * * * *

"RÉSUMÉ

"As before stated, this is the first action tried after the passage of the Bank Merger Act of 1960. The controversy inherent in the case between coordinate branches of the executive department of Government is to be regretted. Congress, in passing the Bank Merger Act, deliberately fixed the responsibility of approving or disapproving proposed mergers of national banks in the Comp-

troller of the Currency. This responsibility was fixed despite vigorous protests of individual bankers and the Department of Justice. The Comptroller of the Currency then, by act of Congress, was of necessity required to consider the reports of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Attorney General, with respect to the competitive factors involved. All three of these departments of Government reported that in the opinion of their experts, the consummation of the proposed merger would adversely affect competition in the Philadelphia area. The Federal Deposit Insurance Corporation concluded that the merger would not be adverse in the regional, national, and international field of competition. With these reports available to him, and after considering them, the Comptroller, in pursuance of his statutory duty, reviewed them and despite their content, approved the merger as not involving undue concentration of banking power, not tending toward a monopoly, not destructive of competition in the commercial banking field, and definitely in the public interest. The court, after a full trial, agrees completely with the conclusions of the Comptroller of the Currency.

"This is one of the few instances in which one department of the Government, after having been consulted and its advice not being followed, has challenged in the court the findings of a coordinate department of the executive branch of the Government on the basis of disagreements between departments of our Government. And what is the expertise of these three dissenting coordinate branches of the executive department that prompted this challenge? The courts have uniformly held that once Congress has reposed its confidence in the expertise of a particular department, the court should not substitute its judgment in the place and stead of the department involved. The Government has asked this court, without the production of a single shred of evidence, and on the basis of reports no more illuminating than that of the Comptroller of the Currency, to give legal effect to the conclusions of the dissidents, rather than the department charged with the responsibility.

"This court fails to see how any court, without some factual basis being laid therefor, could accede to any such request and this is all the more true in this particular case where experienced, substantial bankers throughout this entire area have appeared in open court, subjected themselves to searching cross-examination, and have unanimously demonstrated that the proposed merger would not cause an undue concentration of banking, would not tend toward a monopoly, and definitely would increase the vigor of competition which the Congress of the United States from the passage of the Sherman Act down to the present date has, by law, attempted to foster.

"The court was not impressed with the attempts of the Government to show that banking is of minor importance in the life of a community generally and of almost absolute unimportance in the business life of the community. The Government, in its attempt to establish this contention by testimony that no single particular individual industrial organization had ever entered a particular territory because of the presence or absence of banking facilities, has ignored the industrial history of the United States. Should one ever speculate as to whether any industry would enter a community without banking facilities, the answer would be completely obvious. Historically, banking facilities have preceded industry in every community.

"The Government also attempted to show that by combining the lending limits of all Philadelphia banks, borrowers in the larger categories could be well accommodated. This ignores again the realities of the situation and the positive testimony that in the larger industries there is a decided reluctance on the part of financial officers to be made the subject of participating loans. With the originating bank, there is also an aversion to these loans as it requires considerable negotiation and technical handling which is to be avoided wherever possible.

"The evidence demonstrated beyond peradventure of doubt that the Philadelphia are, plus parts of Delaware and New Jersey, and also New York City, as well as most of the northeastern part of the United States, is the area of active competition for Philadelphia commercial banks and for the proposed merged bank. The testimony discloses that the competitive effect upon all Philadelphia commercial banks will be minimal. The larger bank, however, will be able to compete on better terms and in a better atmosphere with the banks of other cities and States that have been draining this area of banking business which might well be and perhaps properly should be handled here, and which cannot be handled under present circumstances. That it will benefit the city and area has been established clearly by a fair preponderance of the evidence as has been set forth in the findings of fact of the defendants previously affirmed.

"There is nothing in this record which supports the averments of the complaint that the proposed merger involves an unlawful combination in restraint of trade; would result in or tend toward monopoly, or violate the provisions of the Clayton Act, if applicable; and the proposed merger certainly violates no provision, either express or implied, contained in the Bank Merger Act of 1960.

"Since the proposed merger contains none of the defects alleged in the Government's case and will be in the public interest, it follows that judgment must be entered in favor of the defendants and against the plaintiff."

Legislative History of Section 7 of the Clayton Act, and Its Relation to the Bank Merger Act of 1960

When the Bank Merger Act of 1960 was under consideration, it was generally agreed that one of the reasons it was needed was that section 7 of the Clayton Act including the Celler-Kefauver amendment of 1950, did not apply to bank mergers. The Supreme Court in *U.S.A.* v. *The Philadelphia National Bank and Girard Trust Corn Exchange Bank* (374 U.S. 321, 1963), however, held that section 7 of the Clayton Act applied to a bank merger.

This memorandum reviews the legislative history of the Celler-Kefauver amendment to section 7 of the Clayton Act and subsequent comments on that amendment up to the time of the enactment of the Bank Merger Act, and reaches the conclusion that the Celler-Kefauver amendment was not intended or understood to apply to bank mergers.

1914–1945

Section 7 of the Clayton Act, as enacted on October 15, 1914, provided that no corporation engaged in commerce might acquire the whole or any other part of the stock of another corporation where the effect of the acquisition might be to substantially lessen competition between the two corporations or to restrain commerce in any section or community or to tend to create a monopoly of any line of commerce.

Section 11 of the Clayton Act (15 U.S.C. 21) provided that authority to enforce compliance with section 7 and other sections of the Clayton Act was vested in the ICC where applicable to common carriers under its jurisdiction, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the FTC where applicable to all other character of commerce.

The House and Senate reports on the bill which became the Clayton Act made it clear that section 7 was intended to deal with holding companies "whose primary purpose is to hold stocks of other companies" as "a means of holding under one control the competing companies whose stocks it has thus acquired." (S. Rept. 627, p. 17, H. Rept. 698, p. 13, on H.R. 15657, 63d Cong., 2d sess.)

During the 1930's and 1940's it became apparent that mergers and asset acquisitions were as effective means of promoting monopolies as holding companies. Since section 7 of the Clayton Act applied only to stock acquisitions, not to asset acquisitions or mergers, various proposals were made to close this gap, beginning in 1945 and culminating in the 1950 Celler-Kefauver amendment to section 7 (H.R. 2734, 81st Cong., 64 Stat. 1125).

The interrelationship between the various bills, beginning in 1945, was spelled out in the testimony of Congressman Patman, as chairman of the House Select Committee on Small Business, when he testified on H.R. 2734 before a subcommittee on the Senate Judiciary Committee on September 23, 1949 (hearings on corporate mergers and acquisitions, pp. 129–130). In this statement, Congressman Patman referred specifically to the House hearings on H.R. 515, 80th Congress; H.R. 2357, 79th Congress; House Report 596, 80th Congress on H.R. 3736 (June 17, 1947), and House Report 1820 on H.R. 5535, 79th Congress (Mar. 26, 1946).

78th and 79th Congresses

S. 577, 78th Congress, H.R. 2357 and S. 615, 79th Congess, were identical bills which would have (1) extended section 7 to cover asset acquisitions of all corporations engaged in commerce, (2) exempted from section 7 transactions consummated under authority from CAA, FCC, FPC, ICC, SEC, or the Federal Reserve Board, and (3) required prior approval by FTC of stock or asset acquisitions by corporations subject to FTC.

On March 21, 1945, the Chairman of the Federal Reserve Board wrote to the chairman of the House Judiciary Committee requesting that H.R. 2357 be amended so as to require prior approval by the Federal Reserve Bank of bank stock or asset acquisitions. (Copies of this letter and the amendments recommended therein are attached, marked "Exhibit A.")

On June 8, 1945, a committee print of H.R. 2357 was prepared (copy attached, marked "exhibit B"), which representatives of the Federal Reserve Board supported in their testimony before the subcommittee on September 20, 1945. (Excerpts of the testimony of representatives of the Federal Reserve Board are attached, marked "exhibit C.") The committee print of June 8, 1945, would have exempted acquisitions by banks from section 7 of the Clayton Act but would have required approval by the Comptroller, the Federal Reserve Board, and the FDIC. It would have required proponents of a merger to establish that

the proposed acquisition was "consistent with the public interest" and it would have established extensive criteria to determine whether the merger was in the public interest.

The bill was reported on January 21, 1946, as H.R. 4810, House Report 1480, 79th Congress. As reported, the bill covered only asset acquisitions by corporations subject to FTC. The reference to the Board in the provision giving an exemption for mergers approved by certain agencies was omitted from the bill, as suggested by the Federal Reserve Board, but none of the other amendments they suggested were accepted. In its report the committee stated:

"The proposed amendments affect only corporations subject to the jurisdiction of the Federal Trade Commission. The jurisdictions and regulatory powers of the ICC, the FCC, the CAA, and the Federal Reserve Board in their respective fields remain unchanged."

A similar bill, H.R. 5535, 79th Congress, was reported by the House Judiciary Committee on March 26, 1946, House Report No. 1820, which took substantially the same form as the Celler-Kefauver amendment of 1950. The committee report on H.R. 5535 also stated:

"The proposed amendments affect only corporations subject to the jurisdiction of the Federal Trade Commission. The jurisdictions and regulatory powers of the ICC, the FCC, the CAA, and the Federal Reserve Board in their respective fields remain unchanged."

EIGHTIETH CONGRESS

In the 80th Congress, H.R. 515, similar to H.R. 5535, 79th Congress, was introduced on January 6, 1947; and S. 104, the same as S. 615, 79th Congress, was introduced on January 8, 1947. On April 16, 1947, the Chairman of the Board wrote to Senator O'Mahoney. He recommended extension of section 7 to asset acquisitions and suggested that S. 104 be amended "to include a requirement of prior approval by the Board of all acquisitions which are now subject to its jurisdiction on an after-the-event basis." (A copy of this letter is attached, marked "Exhibit D.")

Hearings were held on H.R. 515, at which a representative of the Federal Reserve Board called to the attention of the committee the testimony it had given earlier on H.R. 2357, 79th Congress, and urged particularly consideration of the bank holding company problem. The Board discussed the question of acquisition by banks and indicated that this was not its primary interest. (An excerpt from the testimony is attached, marked exhibit E.) The bill was reported as H.R. 3736, 80th Congress, Senate Report No. 596. In the committee's report, there was no discussion of the question of banks or the Federal Reserve Board's recommendations.

EIGHTY-FIRST CONGRESS

During the 1st session of the 81st Congress, bills were introduced by Congressmen Jackson (H.R. 988), Mansfield (H.R. 1240), Hobbs (H.R. 2006), and Celler (H.R. 2734). Hearings were held, at which the Federal Reserve Board and other banking agencies did not appear. In the House report (H.R. 1191, 81st Cong., Aug. 4, 1949), references were made to the many bills introduced from 1945 through 1948, but there was no discussion of banking or of the suggestions which the Federal Reserve Board had made earlier.

In the Senate hearings, also, the Federal Reserve Board and other banking agencies did not testify. It was clear, from Congressman Patman's testimony and others, that H.R. 2734 was viewed as continuing the consideration of the problem involved in the earlier hearings and committee action.

Senate Report 1775, 81st Congress, June 2, 1959, reporting H.R. 2734, did not refer to banking and did not contain any reference to the suggestions made earlier by the Federal Reserve Board.

Before the Celler-Kefauver Act became law, by the President's approval of H.R. 2734 on December 29, 1950, the Federal Reserve Board specifically called to the attention of Congressman Celler, the chairman of the Subcommittee on Monopoly Power and the sponsor of H.R. 2734, the fact that the bill would not affect banks, in a letter dated October 12, 1950 (see p. 27 above). In this letter, the Board specifically pointed out that while H.R. 2734 would make section 7 applicable to the acquisition of assets, it would do so only in the case of corporations subject to the jurisdiction of FTC. It pointed out that with the exception of the Board, the other agencies responsible for enforcing compliance with section 7, and whose approval of a merger would exempt it from section 7, already had authority to control asset acquisitions. The Board concluded by stating:

"This fact would seem to be of interest because it calls attention to a weakness in section 7 of the Clayton Act, a provision for which this Board has responsibility

for enforcing compliance where applicable to banks. As you know, section 7 in effect forbids one corporation to acquire the capital stock of another corporation engaged in commerce if the effect may be to lessen competition or tend to create a monopoly. However, the section does not apply to the acquisition of assets.

"H.R. 2734 which passed the House of Representatives on August 15, 1949, and is now pending in the Senate, would broaden section 7 of the Clayton Act so that it would also apply to acquisitions of assets—but only in the case of corporations that are subject to the jurisdiction of the Federal Trade Commission. It is understood that, with the exception of this Board, all the other agencies having responsibility for enforcing compliance with section 7 of the Clayton Act already have general authority, under other provisions of law, over acquisitions of assets in the case of persons for whom they have enforcement responsibility in connection with section 7. However, even with the enactment of H.R. 2734, section 7 would continue to be confined to acquisitions of capital stock insofar as banks are concerned."

The Senate passed H.R. 2734 on December 13, 1950 (96 Congressional Record 16508), and the House accepted the Senate amendments on December 14, 1950, with little discussion and without reference to banks or to the letter of October 12, 1950 (96 Congressional Record 16573). The President approved it on December 29, 1950 (Public Law 899, 81st Cong.). Copies of the law and of the changes make by the amendment are attached (exhibit F).

It seems clear from this legislative history, involving a series of related bills over the period from 1945 through 1950, that Congress knew of the problems of bank mergers and reached a deliberate decision not to attempt to deal with them in the amendment to section 7 of the Clayton Act which became law on December 29, 1950. While the record does not disclose any statement of a reason for this decision, it may well have been based on the feeling that the addition of such a provision would have resulted in the defeat of the bill. It seems pertinent to point out that Reorganization Plan No. 1 of 1950, which would have transferred to the Secretary of the Treasury all the powers of officials in the Treasury Department, including the Comptroller of the Currency, was defeated by a vote of 65 to 13, on the ground that the Comptroller's functions should be left vested in him (96 Congressional Record 6891, 6898, May 11, 1950). Reorganization Plan No. 26 of 1950, similar to Reorganization Plan No. 1 except that the functions of the Comptroller of the Currency were left in him, took effect without objection (96 Congressional Record 8016–8020, 64 Stat. 1280, June 5, 1950).

1950–1960

Congressional views

The House Judiciary Committee and its staff consistently took the position that the Celler-Kefauver amendment of 1950 did not affect bank mergers.

On September 17, 1952, Congressman Celler, chairman of the Antitrust Subcommittee of the House Judiciary Committee, presented a staff report on "Bank Mergers and Concentration of Banking Facilities," printed as a committee print. The following statement appears in the staff introduction to this report:

"Late in the year 1950, Congress enacted the Celler antimerger bill into law. This statute closed a hiatus in the antitrust laws of long standing. Section 7 of the Clayton Act, while by its specific terms prohibiting mergers of corporations which might lessen competition when achieved through the acquisition of stock, had been long interpreted as leaving unaffected mergers of a like nature when achieved through the purchase of corporate assets.

"While the amended version of section 7 of the Clayton Act now cuts both ways and prohibits consolidations which may substantially lessen competition whether accomplished through the acquisition of assets or of stock, the new provisions relating to assets apply only to corporations subject to the jurisdiction of the Federal Trade Commission. This leaves the law exactly as it was prior to the passage of the Celler Antimerger Act insofar as business organizations outside the scope of the Federal Trade Commission's jurisdiction are concerned.

"On March 21, 1945, the Board of Governors of the Federal Reserve System wrote to the chairman of the Committee on the Judiciary requesting that the provisions of H.R. 2357, 79th Congress, 1st session, one of the early predecessors of the Celler Antimerger Act, be extended so as to include corporations subject to the jurisdiction of the Federal Reserve Board under section 11 of the Clayton Act. Because of the revisions made in subsequent versions of antimerger bills, however, it became impracticable to include within the scope of the act corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by section 11 of the Clayton Act, are therefore circumscribed insofar as

mergers are concerned only by the old provisions of section 7, and certain additional statutes which do not presently concern themselves substantively with the question of competition in the field of banking" (p. vii).

The subcommittee staff, on the basis of their conclusion that bank mergers were for all practical purposes uncontrolled, recommended the enactment of legislation to regulate bank mergers (pp. 46–50), and an amendment to subsection (c) of section 18 of the Federal Deposit Insurance Act was suggested. This would have required the approval of the Comptroller, the Federal Reserve Board, or the FDIC for the merger of an insured bank, and it would have required the agency considering a merger to take into consideration whether the effect of the merger "may be to lessen competition unduly or to tend unduly to create a monopoly contrary to the policy of Congress hereby declared in favor of local ownership and control of banks and competition in the field of banking" (p. 51).

Congressman Celler in 1955 introduced H.R. 5948, 84th Congress, which would have placed bank mergers under section 7 of the Clayton Act. In his statement opening the hearings on this bill on July 5, 1955, Congressman Celler made the following comments:

"Section 7 of that act [Clayton Act] prohibited bank mergers and industrial corporate mergers achieved by stock acquisitions where the effect might be to substantially lessen competition or tend to create a monopoly.

"This wording left a widely exploited gap. Banks and corporations could acquire assets of other firms and thus avoid the provisions of section 7. This gap, insofar as it applies to industrial corporations, was closed by the Celler-Kefauver Antimerger Act of 1950. My bill, H.R. 5948, would close the gap insofar as banks are concerned and prohibit bank mergers achieved by asset as well as stock acquisitions where the effect might be substantially to lessen competition or tend to create a monopoly in any section of the country" (House Antitrust Subcommittee of the Committee on the Judiciary on H.R. 5948, 84th Cong., 1st sess., July 5, 1955, pp. 1–2).

The House Judiciary Committee reported H.R. 5948 on July 26, 1955 (H. Rept. 1417, 84th Cong.). In its report, the committee made the following statement:

"The wording of section 7 prohibiting mergers achieved through stock acquisitions left a widely exploited gap. Banks and other corporations could acquire the assets of other firms and thus avoid altogether the provisions of section 7, or they could purchase the stock of other firms and exercise the control thus obtained to acquire their assets. * * *

"This gap insofar as it applied to nonbanking corporations was closed by the Celler-Kefauver Antimerger Act of 1950 which included asset acquisitions within the purview of section 7 and prohibited mergers which may substantially lessen competition whether accomplished through asset or stock acquisitions. However, because of the revisions made in subsequent versions of antimerger bills, it became impracticable to include within the scope of the Celler-Kefauver Act corporations other than those subject to the jurisdiction of the Federal Trade Commission. Therefore, asset acquisitions by banks remained unaffected by the new law since authority to enforce the provisions of section 7 dealing with banks are vested in the Federal Reserve Board and not in the Federal Trade Commission" (H. Rept. 1417 on H.R. 5948, 84th Cong., 1st sess., July 26, 1955, p. 3).

H.R. 5948 did not become law.

When the bank merger bill was pending before the Senate Banking and Currency Committee, Chairman Celler appeared and testified in support of legislation to regulate bank mergers, preferably along the lines of H.R. 5948. In his testimony, he stated:

"Section 7 was designed to stop mergers beyond the reach of the Sherman Act but its failure to include mergers accomplished by asset acquisitions resulted in a loophole which so far as nonbanking corporations are concerned was closed by passage of the Celler-Kefauver Act of 1950. Moreover, because of revisions made in subsequent versions of various antimerger bills, it became impracticable to include within the scope of the Celler-Kefauver Act corporations other than those subject to the jurisdiction of the Federal Trade Commission. This left asset acquisitions by banks unaffected by the new law since authority to enforce the provisions of section 7 dealing with banks is vested in the Federal Reserve Board and not in the Federal Trade Commission.

"Beyond this, virtually all bank mergers are accomplished by asset acquisitions by virtue not only of provisions of Federal law prohibiting member banks of the Federal Reserve System, with a few exceptions, from purchasing corporate stocks, but also of various State statutes prescribing similar limitations. For these reasons, section 7 of the Clayton Act has little value in coping with the mounting trend of bank merger activity. * * *

"To close this loophole in section 7 and provide Federal enforcement agencies with the same authority to move against bank mergers accomplished by asset acquisitions, I introduced H.R. 5948 in the 84th Congress. This bill was adopted by the House without dissent on February 6, 1956, but was not brought up on the Senate floor for vote. I might add that the measure was in accordance with the President's recommendations submitted to the Congress in 1956 and repeated in 1957, 1958, and 1959, calling for revision of antitrust legislation to cover the bank mergers accomplished by asset acquisitions" (Senate Banking and Currency Committee Hearings on S. 1062, 86th Cong., 1st sess., Mar. 18, 1959, p. 94).

Chairman Celler presented similar testimony to the House Banking and Currency Committee in February 1960 (hearings on S. 1062, 86th Cong., 2d sess., pp. 125–126).

When S. 1062 came to the House floor, Congressman Celler supported it, though he stated that he would have preferred more rigorous legislation along the lines of section 7 of the Clayton Act. (See p. 296, above.)

The Senate and House committee reports on S. 1062, as well as previous reports on similar legislation, left no doubt of the committees' views that section 7 of the Clayton Act did not apply to bank mergers (S. Rept. 196, 86th Cong., p. 5; H. Rept. 1416, 86th Cong., p. 9). The congressional debates throughout left no question that there was universal understanding that, since bank mergers were not accompanied by stock acquisitions, section 7 of the Clayton Act did not apply to bank mergers (Senator Robertson, May 13, 1959, 105 Congressional Record 8076; Senator O'Mahoney, May 14, 1959, 105 Congressional Record 8125–8126; Senator Kefauver, May 14, 1959, 105 Congressional Record 8130; Congressman Spence, Apr. 4, 1960, 106 Congressional Record 7257; Senator Fulbright, May 6, 1960, 106 Congressional Record 9711; Senator Johnson, May 6, 1960, 106 Congressional Record 9715).

Executive branch

Until the complaint was filed in the *Philadelphia* case, there was no indication that any responsible Government official took the position that bank mergers were subject to section 7 of the Clayton Act. On the contrary, many responsible officials flatly stated, under circumstances where their views constituted a statement of official position, that section 7 of the Clayton Act did not apply to bank mergers, and that consequently further legislation to regulate bank mergers was essential.

The President's Economic Report for 1956 made the following recommendation:

"Federal regulation should be extended to all mergers of banking institutions combined with the requirement for advance notice. This extension of the law would give the Government an opportunity to prevent mergers that are likely to result in undue restraint of banking competition" (pp. iv and 77–78).

Similar recommendations were made in the President's Economic Reports for 1957 (pp. 51, 73), 1958 (pp. 64, 78), 1959 (pp. 53, 67), and 1960 (p. 56).

Representatives of the Department of Justice, including particularly the Antitrust Division, advised the Congress on six different occasions that legislation was needed to control bank mergers because section 7 of the Clayton Act did not apply to bank mergers. On July 5, 1955, Stanley N. Barnes, Assistant Attorney General, Antitrust Division, testified before the Antitrust Subcommittee of the House Judiciary Committee, over which Congressman Celler was presiding as chairman, on H.R. 5948, a bill which would have amended section 7 of the Clayton Act to cover banks. Judge Barnes made the following statement:

"The pending proposal would plug a loophole left by present section 7's failure to cover asset acquisition by banks. On the one hand, that provision's stock acquisition bar applies to all corporations 'engaged in commerce.' Section 7's acquisition portion, in sharp contrast, covers only corporations 'subject to the jurisdiction of the Federal Trade Commission.' Further, section 11 of the Clayton Act exempts banks from Federal Trade Commission jurisdiction by specifying that 'authority to enforce compliance' with section 7 'is hereby vested * * * in the Federal Reserve Board where applicable to banks, banking associations, and trust companies.' On the basis of these provisions this Department has concluded that asset acquisition by banks is not covered by section 7 as amended in 1950.[1]

"[1] Reaching the same conclusion, a House Judiciary subcommittee staff report explained that, because of revisions in amendments to sec. 7, '* * * it became impracticable to include within the scope of the act, corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by sec. 11 of the Clayton Act, are therefore circumscribed insofar as mergers are concerned only by the old provisions of sec. 7 * * *' (staff report to Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 82d Cong., 2d sess. (September 1952))."

"I am sure the chairman will be interested in the notation attached as note 1, because on a previous occasion I raised a question whether or not this was an intentional omission or an inadvertent omission. I was inclined to believe it was inadvertent. Your chairman was inclined to believe that it was not; that it had been discussed. A further examination of the history proves that you were right and my supposition was wrong, Mr. Chairman." (Hearings on H.R. 5948, 84th Cong., p. 6.) (See p. 327, above, for a further quotation from the same hearing.)

Other statements to the effect that bank mergers were not subject to section 7 of the Clayton Act were made by Judge Barnes at a hearing before a subcommittee of the Senate Banking and Currency Committee on June 18, 1956 (hearings on S. 3911, 84th Cong., pp. 59–60); Herbert Brownell, Jr., Attorney General, at a hearing before the Senate Banking and Currency Committee on February 18, 1957 (hearings on the Financial Institutions Act of 1957, 85th Cong., 1st sess., pt. 2, pp. 1009–1010); Victor R. Hansen, Assistant Attorney General, Antitrust Division, at a hearing before the House Banking and Currency Committee on July 18, 1957 (hearings on S. 1451 and H.R. 7026, 85th Cong., 1st sess., pt .1, pp. 125–126); Lawrence E. Walsh, Deputy Attorney General, in a letter of March 18, 1959 (hearings on S. 1062, 86th Cong., 1st sess., Senate Banking and Currency Committee, p. 9); and Robert A. Bicks, Acting Assistant Attorney General, Antitrust Division, at a hearing of a subcommittee of the House Banking and Currency Committee on February 18, 1960 (hearings on S. 1062, 86th Cong., 1st sess., pp. 161–162).

It seems clear that every responsible official of the Government, from 1950 to 1960, who took a position on the subject took the position that, as bank mergers were not accomplished by stock acquisition, section 7 of the Clayton Act would not apply to bank mergers. This applies to Congressman Celler and Senator Kefauver, the authors of the Celler-Kefauver amendment of 1950, and to every other Senator and Representative who spoke on the subject, and to every representative of the Department of Justice, as well as representatives of the Federal Reserve Board, Federal Trade Commission, and other agencies. No statements to the effect that section 7 of the Clayton Act would or should apply to the Bank Merger Act have been found up to the filing of the complaint in the Philadelphia case on February 25, 1961.

It is equally clear that the Bank Merger Act of 1960 and other similar proposals to regulate bank mergers were sponsored and supported, and the Bank Merger Act was passed, on the basis of this understanding.

MATTHEW HALE, *Chief of Staff.*

EXHIBIT A

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Washington, March 21, 1945.

Hon. HATTON W. SUMNERS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. SUMNERS: This is in reply to your letter of March 7, 1945, in which you enclosed copies of a bill introduced by Congressman Kefauver, H.R. 2357, to amend an act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved March 15, 1914 (38 Stat. 730), and in which you request that your committee be furnished with comments concerning such proposed legislation.

The Board has considered Congressman Kefauver's bill with a great deal of interest. The two basic objectives which seem to be presented therein are (1) to subject the acquisitions of assets of companies to the same restrictions as are now imposed by the Clayton Act upon acquisitions of shares of such companies, and (2) to require, as to certain acquisitions by or on behalf of any corporation now subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of such act, a finding by that Commission that such acquisitions will be consistent with the public interest before they may be lawfully consummated.

The Board sees no objection to legislation which will effectively attain these objectives. As to the first, the Board feels that to include acquisitions of assets within the proscriptions of the Clayton Act will go far toward eliminating a very practical as well as difficult enforcement problem which seems to inhere in the present language of that act. Undoubtedly there have been many instances when the underlying aim of the Congress as expressed in this law has been circumvented in whole or in part through acquisitions of assets, instead of shares, of one

corporation by another. The evils of substantially lessened competition, restraint of trade and commerce and monopoly have thus been perpetuated in the face of the statute, simply because the device for accomplishing these ends is not specifically outlawed. The Board feels that the language of H.R. 2357 is adequate to correct this situation.

The second basic objective of Congressman Kefauver's bill seems equally desirable. Perhaps its most salutary advantage lies in the fact that it attempts to prevent the harmful results of unprincipled business expansion in an appropriate field of regulation, rather than attempting to correct these evils after they have occurred. The Board has been of the opinion for some time that the complexities of modern business render very difficult a satisfactory application of corrective sanctions. Too often this remedy may work such substantial injustices and be productive of such incidental injurious consequences that the direct application of such sanctions in given cases may work against rather than for the public interest. These observations would seem particularly appropriate of situations affecting banks. Under existing law, for all practical purposes it is not until after the stock of a given bank has been acquired that the acquiring person or company may be proceeded against under the Clayton Act. Assuming that the effect of such acquisition raises an enforcement question under that act, it at once becomes apparent that a public proceeding brought to test such question may have the very undesirable result of disturbing public confidence in the bank, the stock of which has been acquired, but which is not itself a party thereto. It is the existence of such imponderables as these which tend to demonstrate the inadequacy of corrective sanctions, generally.

In its annual report to Congress for the year 1943 the Board, in discussing the need for legislation respecting bank holding companies, had occasion to express similar views to those just given. For example, at page 35 of such report, the Board said:

"Finally, even if the holding company chooses to subject itself to regulation, the effectiveness of the Board's supervision is hindered rather than helped by the penalties provided by the statute. For violation of the statute or of its agreement with the Board, the holding company's voting permit may, after hearing, be revoked. The consequences flowing from such a revocation are that the member bank whose stock is controlled cannot receive deposits of public moneys of the United States nor pay any further dividends to the holding company. Also, if the controlled bank is a national bank, its charter may be forfeited, and if it is a member State bank, its membership in the System may be terminated. The Board believes that means should be provided for reaching the holding company and its management directly rather than indirectly, as is now the case."

It is believed that much of the other comments that appeared in the Board's annual report for 1943 would be helpful to the committee in its present deliberations. There are enclosed herewith several copies of this report for the convenience of the members.

In the light of the above observations, the Board recommends that the second objective of H.R. 2357 be not limited to apply solely to those cases which fall within the jurisdiction of the Federal Trade Commission. As your committee is aware, other agencies, including this Board, are invested with similar jurisdiction to that of the Federal Trade Commission under the existing provisions of section 11 of the Clayton Act and the reasoning for the proposed change would seem to apply with equal force to acquisitions that are within the range of jurisdiction now conferred upon each of such other agencies, respectively. Accordingly, the Board recommends that the language of Congressman Kefauver's bill be extended to cover all classes of acquisitions which are now encompassed within the jurisdictional provisions of section 11, with power in each of the authorities therein enumerated to administer the proposed licensing feature of the bill. To the end that our suggestions may be presented in a formal manner, we have prepared a draft containing our recommended changes, which are all included between line 11 on page 4 and line 23 on page 6 of the present bill, and enclose it herewith for the consideration of your committee.

One final and purely clerical correction: H.R. 2357 refers to this Board as the Federal Reserve Board. The correct title is Board of Governors of the Federal Reserve System.

Sincerely yours,

M. S. Eccles, *Chairman.*

EXHIBIT B

[COMMITTEE PRINT]

JUNE 8, 1945

79TH CONGRESS
1ST SESSION

H. R. 2357

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 26, 1945

Mr. KEFAUVER introduced the following bill; which was referred to the Committee on the Judiciary

[Omit the part struck through and insert the part printed in italic]

A BILL

To amend an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730), as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 7 and 11 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (U. S. C. Annotated, title 15, sec. 18), are hereby amended to read as follows:

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part

of the stock or other share capital, or the whole or any part of the assets, of another corporation engaged also in commerce, where the effect of such acquisition may be (1) to substantially lessen competition between the corporation whose stock is, or whose assets are, so acquired and the corporation making the acquisition, or (2) to restrain such commerce in any section or community, or (3) to tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be (1) to substantially lessen competition (a) between such corporation or corporations or any of them, whose stock or other share capital or assets are so acquired, and any other corporation, engaged in commerce, owned or controlled by the acquiring corporation, or (b) between any two or more of the corporations whose stock or assets are so acquired; or (2) to restrain such commerce in any section or community; or (3) to tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same

by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall this section apply to acquisitions by banks, banking associations, and trust companies; but no acquisition by a bank, banking association, or trust company which would otherwise be subject to this section shall be consummated without the prior approval of (A) the Comptroller of the Currency in the case of national banks and district banks, (B) the Board of Governors of the Federal Reserve System in the case of State member banks other than district banks, and (C) the Federal Deposit Insurance Corporation in the case of State nonmember insured banks other than district banks.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of

the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Congress to the Civil Aeronautics Authority, Federal Communications Commission, Federal Power Commission.

~~Federal Reserve Board,~~ Interstate Commerce Commission, or the Securities and Exchange Commission.

~~"Wherever the consummation of any plan, undertaking, or agreement by or on behalf of any corporation engaged in or affecting commerce or engaged in manufacturing or processing for distribution in commerce or by or on behalf of any of its subsidiaries so engaged, to acquire the whole or any part of the stock or other share capital or the whole or any part of the assets other than inventories of any other corporation likewise engaged would involve property to the value of more than $, no such plan, undertaking, or agreement by or on behalf of any corporation subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of the Clayton Act, as amended, shall be consummated, effectuated, and completed except upon and after compliance with the following requirements:~~

"No plan, undertaking, or agreement by or on behalf of any corporation subject to the jurisdiction of the Federal Trade Commission or the Board of Governors of the Federal Reserve System under sections 7 and 11 hereof; to acquire either directly or indirectly through any individual or corporation, the whole or any part of the stock or other share capital or the whole or any part of the assets of any other corporation engaged in a competitive line or lines of commerce shall be consummated, effectuated, and completed except

upon and after compliance with the following requirements:

"(1) That the parties to such acquisition shall have discharged the burden of establishing before the *Board of Governors of the Federal Reserve System in the case of acquisitions of the stock or assets of banks, banking associations, and trust companies, and the* Federal Trade Commission *in the case of acquisitions of the stock or assets of all other corporations not specifically excepted hereunder,* that the acquisition would be consistent with the public interest.

"(2) That the parties to such acquisition shall have obtained the written and publicly announced finding of ~~the Federal Trade~~ *such* Commission *or Board* that consummation of the acquisition would be consistent with the public interest. If upon the showing made by the parties to such acquisition ~~the~~ *such* Commission *or Board* shall be of the opinion that it is not consistent with the public interest according to the standards hereinabove established, it shall make a finding to that effect and give the reasons therefor.

"(3) That ~~the Federal Trade Commission~~ *such Commission or Board* shall not find the proposed acquisition to be consistent with the public interest unless it also finds—

"(a) that the acquisition will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in

the country as a whole) in the trade, industry, or line of commerce in which such corporations are engaged;

"(b) that the size of the acquiring corporation after the acquisition will be compatible with the existence and maintenance of effective competition in the trade, industry, or line of commerce in which it is engaged;

"(c) that the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce affected as materially to lessen the effectiveness of competition therein;

~~"(d) that the acquiring corporation has not, to induce the acquisition, indulged in any unlawful methods of competition, and has not otherwise violated the provisions of the Federal Trade Commission Act, as amended;~~

"(d) that the acquiring corporation has not, to induce the acquisition, or to eliminate the competition of the corporation sought to be acquired, indulged in unfair methods of competition in violation of the Federal Trade Commission Act, as amended;

"(e) that the acquisition will not be incompatible

"(e) that the acquisition will not be incompatible with greater efficiency and economy of production, distribution, and management.

"Provided, That the Federal Trade Commission and the Board of Governors of the Federal Reserve System may from time to time by rule or regulation and subject to such terms and conditions as may be prescribed therein exempt such plan, undertaking, or agreement from the requirement of advance approval if it finds compliance with said requirement in particular situations is not necessary in the public interest by reason of the small amount involved or the absence of a substantially adverse effect on competition; but no such plan, undertaking, or agreement shall be exempt from said requirement where the value of the consideration involved in the acquisition exceeds $1,000,000.

"In the event that the Federal Trade Commission or the Board of Governors of the Federal Reserve System shall find any such contemplated acquisition not to be consistent with the public interest, under the standards and terms of subparagraph (3) of this section, the said Commission or Board shall enter an order requiring the parties to cease and desist from the consummation thereof; and the parties to any such contemplated acquisition, or any of them, may obtain a review of such order in the Circuit Court of Appeals in the manner and subject to the procedure provided in section 11 of this Act for petitions for the review of other orders to cease and desist issued under this Act.

"If any such plan, undertaking, or agreement be con-

summated without compliance with the foregoing requirements or in violation of an order of the said Commission or Board not reversed pursuant to the procedure provided under section 11 hereof, the corporation so acquiring shall be guilty of a misdemeanor and the provisions of sections 14, 15, and 16 of this Act shall apply.

"Upon consummation of any acquisition pursuant to the required finding of ~~the Federal Trade Commission~~ *such Commission or Board,* no proceedings shall thereafter be brought by the Government on the ground that such acquisition constitutes a violation of section 7 of the Clayton Act, as amended.

"SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Authority where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Com-

mission where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission, authority, or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission, authority, or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission, authority, or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission, authority, or board. If upon such hearing the commission, authority, or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order re-

quiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission, authority, or board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission, authority, or board while the same is in effect, the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make

and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission, authority, or board. The findings of the commission, authority, or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, authority, or board, the court may order such additional evidence to be taken before the commission, authority, or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, authority, or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 240 of the Judicial Code.

"Any party required by such order of the commission,

authority, or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission, authority, or board as in the case of an application by the commission, authority, or board for the enforcement of its order, and the findings of the commission, authority, or board as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission, authority, or board shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission, authority, or board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

"Complaints, orders, and other processes of the commis-

sion, authority, or board under this section may be served by anyone duly authorized by the commission, authority, or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

H.R. 2357 (79th Cong.)

Comparative print showing suggested changes on pages 4, 5, and 6 (beginning with line 11 on p. 4 and ending with line 23 on p. 6)

[Suggested amendments shown in brack brackets and italic]

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Congress to the Civil Aeronautics Authority, Federal Communications Commission, Federal Power Commission, [Federal Reserve Board,] *Board of Governors of the Federal Reserve System*, Interstate Commerce Commission, or the Securities and Exchange Commission.

Wherever the consummation of any plan, undertaking, or agreement by or on behalf of any corporation engaged in or affecting commerce or engaged in manufacturing or processing for distribution in commerce or by or on behalf of any of its subsidiaries so engaged, to acquire the whole or any part of the stock or other share capital or the whole or any part of the assets other than inventories of any other corporation likewise engaged would involve property to the value of more than $——, no such plan, undertaking, or agreement [by or on behalf of any corporation subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of the Clayton Act, as amended,] shall be consummated, effectuated, and completed except upon and after compliance with the following requirements:

[(1) That the parties to such acquisition shall have discharged the burden of establishing before the Federal Trade Commission that the acquisition would be consistent with the public interest.]

(1) That the parties to such acquisition shall have discharged the burden of establishing that the acquisition would be consistent with the public interest before the Interstate Commerce Commission in the case of stock or assets of common carriers subject to the Interstate Commerce Act, as amended; before the Federal Communications Commission in the case of stock or assets of common carriers engaged in wire or radio communication or radio transmission of energy; before the Civil Aeronautics Authority in the case of stock or assets of air carriers and foreign air carriers subjec to the Civil Aeronautics Act of 1938; before the Board of Governors of the Federal Reserve System in the case of stock or assets of banks, banking associations and trust companies; and before the Federal Trade Commission in the case of stock or assets of corporations engaged in all other character of commerce.

(2) That the parties to such acquisition shall have obtained the written and publicly announced finding of the [Federal Trade Commission] *Appropriate Commission, Authority, or Board* that consummation of the acquisition would be consistent with the public interest. If upon the showing made by the parties to such acquisition [the Commission] *such Commission, Authority, or Board* shall be of the opinion that it is not consistent with the public interest according to the standards hereinabove established it shall make a finding to that effect and give the reasons therefor.

(3) That the [Federal Trade Commission] *Appropriate Commission, Authority, or Board* shall not find the proposed acquisition to be consistent with the public interest unless it also finds—

(a) that the acquisition will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in the country as a whole) in the trade, industry, or line of commerce in which such corporations are engaged;

(b) that the size of the acquiring corporation after the acquisition will be compatible with the existence and maintenance of effective competition in the trade, industry, or line of commerce in which it is engaged;

(c) that the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce affected as materially to lessen the effectiveness of competition therein;

(d) that the acquiring corporation has not, to induce the acquisition, indulged in any unlawful methods of competition, and has not otherwise violated the provisions of the Federal Trade Commission Act, as amended; *any of the Acts of Congress now being administered by such Commission, Authority, or Board;*

(e) that the acquisition will not be incompatible with greater efficiency and economy of production, distribution, and management.

Upon consummation of any acquisition pursuant to the required finding of [the Federal Trade Commission,] *the appropriate Commission, Authority, or Board*, no proceedings shall thereafter be brought by the Government on the ground that such acquisition constitutes a violation of section 7 of the Clayton Act, as amended.

48-140 O—65——23

Exhibit C

Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 79th Congress, 1st Session, 1945, on H.R. 2357, pp. 336–340

Statement of Ronald Ransom, Vice Chairman, Board of Governors of the Federal Reserve System

Mr. Ransom. I am Vice Chairman of the Board of Governors of the Federal Reserve System.

The Board has wholeheartedly endorsed the proposal for amendment of the Clayton Act that is now before this committee. They feel that the amendments are of paramount importance and, in connection with these proposed amendments, the Board has helped to add, with the help of the Federal Trade Commission, some additional proposals that concern the field of banking, which we think is of vital importance in the whole matter.

In order to conserve your time as much as I can, I would like to ask you to let Mr. Townsend, counsel to the Board, report very briefly the purpose behind those proposals.

Mr. Walter. Thank you very much.

Statement of J. Leonard Townsend, Counsel, Board of Governors, Federal Reserve System

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Mr. Townsend. Briefly, may it please the members of the committee, the position of the Board is this:

Under the Clayton Act as it now stands, not only does the Federal Trade Commission assume jurisdiction over a vast domain of companies, but so do a number of other agencies—the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Authority, and the Federal Reserve Board.

Now, since the passage of the Clayton Act all of the other agencies mentioned by me have had their individual acts or powers extended to include the fundamental philosophy of the Federal Trade Commission bill; to wit, to enable those agencies within their respective jurisdictions to see to it that in any merger, combination, purchase, and so forth, of competing organizations, the full concept of the public interest as is indicated in the Clayton Act shall be given consideration.

And so it comes to this:

All of the agencies except the Federal Trade Commission and the Federal Reserve Board have the authority today to prevent the things that the Federal Trade Commission bill would now give to it.

I may say to this committee that the Federal Trade Commission has been both courteous, considerate, and extremely helpful in assisting us in coordinating our point of view with that of the bill. In fact, I am indebted to Mr. Kelley, their chief counsel, for the actual draft of the provisions that you now find in your committee print, and I may say further that the Federal Trade Commission itself has received our suggestions and has seen fit, fortunately, formally to approve them.

And so, without more, we have a direct precedent for being included in the bill. All that I need now, therefore, to do, is to say that we do want to be in it, and to show you in just a few sentences the need for our being given the same general jurisdiction.

* * * * * * *

Mr. Walter. There is nothing, Mr. Townsend, in this law that would affect a banking institution where deposits had grown to tremendous proportions.

Mr. Townsend. No, indeed. That is not the purpose of the law as we conceive it, assuming of course that the full scope of our suggestion be adopted.

Mr. Walter. I asked that question because I am afraid that some people are of the opinion that we ought to legislate against size, and I am sure that they would be more firmly of the opinion if they were to read the annual statements filed by some of our great institutions—banking institutions.

Mr. Townsend. I think that is relatively a recent concept.

Mr. Walter. There is nothing in here that would in anywise affect the bank that, because of its operation, was able to become a large institution.

Mr. Townsend. Of course not. Take, for example, your New York institutions. It is perfectly inevitable that huge deposits will find their way to that particular city, and simply to say that, because a bank in New York has x dollars

on deposit, per se it is a monopoly or exercises activities in restraint of trade is false. Not only would such a conclusion be a nonsequitur but, in most instances, would be positively untrue.

The concept we have is that if the individual banker approach is to be preserved, it is positively necessary that some safeguards be set up to prevent unwilling and unneeded and positively dangerous absorptions from time to time, rather than leave that concept of the public interest to the parties who are trying to make the bargains; the latter, as we all know and under ordinary human consideration, is going to be determined on the basis of what is best for themselves. The crying need is to see that all the rest of the citizens in such communities are considered as well.

* * * * * * *

Mr. WALTER. So all you are contending is this, then: And an existing institution intending to acquire the assets of a competitor shall come to Washington and show that it is in the public interest?

Mr. TOWNSEND. That is right.

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EXHIBIT D

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Washington, D.C., April 16, 1947.

Hon. JOSEPH C. O'MAHONEY,
U.S. Senate, Washington, D.C.

DEAR SENATOR O'MAHONEY: During the course of our conversation the other day you asked me to inform you concerning the Board's views on S. 104, a bill to amend the Clayton Act in certain respects. I am pleased to send you the following report on S. 104, which has been approved by the Board.

The two basic objectives of the bill appear to be (1) to subject the acquisition of assets of companies to the same restrictions as are now imposed by section 7 of the Clayton Act upon acquisitions of shares of such companies, and (2) to require, as to certain acquisitions by or on behalf of any corporation now subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of that act, a finding by that Commission that such acquisitions will be consistent with the public interest before they may lawfully be consummated.

The Board favors these changes. As to the first, it is believed that to include the acquisition of assets within the proscriptions of the Clayton Act will go far toward eliminating a very practical as well as difficult enforcement problem, arising from the fact that it has been held that the Federal Trade Commission is without authority to order divestiture in cases where the stock acquired had already been exchanged for assets of the acquired company. Thus, evils of substantially lessened competition, restraints of trade and commerce, and monopoly have continued simply because a device for accomplishing these ends is not specifically outlawed in section 7. The Board feels that the language of S. 104 would correct this situation.

The second basic objective of S. 104 seems equally desirable. Perhaps its most salutary advantage would lie in the fact that it attempts to prevent the harmful results of unrestrained business expansion instead of leaving the attempted control of such expansions to correction after the event has occurred. The Board is convinced that the complexities of modern business render very difficult the satisfactory application of corrective sanctions generally. Too often the remedies in such cases may work such substantial injustices and be productive of such incidental injurious consequences that their direct application may in given cases work against rather than in the public interest. And these observations would seem particularly appropriate in regard to situations respecting banks. Under existing law, for all practical purposes, it is not until after the stock of a given bank has been acquired that the acquiring person or company may be proceeded against under the Clayton Act. Assuming that the effect of such acquisitions raises an enforcement question under that act, it at once becomes apparent that a public proceeding brought to test the question may have very undesirable results, including the lessening of public confidence in the bank involved, even though the latter is in no sense a party to the proceeding. It is the existence of such imponderables as these which tend to demonstrate the inadequacy of corrective sanctions in a field so fraught with potential danger to our national economy as that touching monopolies of trade and commerce.

It is noted, however, that S. 104 would require prior approval of proposed acquisitions of stocks or assets of competing companies only in those situations which fall within the jurisdiction of the Federal Trade Commission. As you know, under section 11 of the Clayton Act, other agencies, including the Board, are charged with the responsibility of administering existing provisions of that act, including section 7. And the same reasons, which justify the proposed change in section 7 to require that proposed acquisitions within the jurisdiction of the Federal Trade Commission be first approved by that agency, would seem to apply with equal force to acquisitions which are within the jurisdictional range of each of the other agencies, respectively.

The Board is advised, however, that, with the exception of the Federal Trade Commission and the Board, each of the other agencies now charged with enforcing section 7 of the Clayton Act already possesses substantially the same power which S. 104 would confer upon the Federal Trade Commission. Thus, the Transportation Act of 1940 gave broad powers to the Interstate Commerce Commission to regulate acquisitions of assets and shares of competing carriers and to permit such acquisitions only upon a finding, among other things, that the result would not be unduly to restrain competition. Both the Federal Communications Commission and the Civil Aeronautics Board appear to have been vested with similar powers to those of the Interstate Commerce Commission in this respect.

It would appear, therefore, that the only agencies now charged with enforcing section 7 of the Clayton Act, which are in need of the particular power to approve or disapprove acquisitions by competing companies within their respective jurisdictions, are the Federal Trade Commission and this Board. In the light of this fact the Board recommends that the language of S. 104 be extended to include a requirement of prior approval by the Board of all acquisitions which are now subject to its jurisdiction on an after-the-event basis. With the inclusion of such a change the Board recommends passage of S. 104.

Sincerely yours,

M. S. ECCLES, *Chairman.*

EXHIBIT E

Hearings before a Subcommittee of the House Committee on the Judiciary on H.R. 515, 80th Congress, 1947

STATEMENT OF HON. J. LEONARD TOWNSEND, ASSISTANT GENERAL COUNSEL, FEDERAL RESERVE SYSTEM

Mr. TOWNSEND. Mr. Chairman and gentlemen of the committee, I had not intended to trespass upon the time of the committee in connection with this bill, for reasons which will be apparent in a moment, until the discussion this morning when Congressman Case opened up the particular subject in which we have a very definite interest, and in which this committee was kind enough to hear us when it had this bill under consideration in the last session.

At that time, you may recall, Vice Chairman Ransom of the Board of Governors accompanied me here and made a preliminary statement. Governor Ransom is unfortunately quite ill and unable to attend the office, and for that reason is unable to be here today; otherwise I am sure he would be.

* * * * * * *

As a part of this discussion, Congressman Case queried one of the witnesses this morning as to whether or not the original provisions of the Kefauver bill—that is, as introduced in the last ssesion—might not be an appropriate method for reaching the problem; and that provision, as you will recall, would have required all prospective acquisitions which would have the result of substantially lessening or eliminating competition between the companies involved to be subject to the scrutiny of the Federal Trade Commission; and it is at that point that the Federal Reserve Board's interests take hold.

* * * * * * *

Mr. TOWNSEND. We think the committee should consider that a before-the-event approval should be required in this type of acquisition. Then the Board—and I may say parenthetically I understand Senator O'Mahoney's bill still contains that provision—then the Board is very definitely interested in recommending certain additions to Congressman Kefauver's bill.

As the committee knows, and as you can verify by turning to page 4 of this bill, there are a number of Federal agencies which administer or are charged with administering section 7 of the Clayton Act. The Federal Trade Commission is

not the only Government agency with responsibilities in this field. And you will see there the provision that authority to administer section 7, among others, is vested in the Federal Reserve Board where applicable to banks, banking associations, and trust companies.

Now, it was the burden of our remarks at the last session of Congress when this matter was before this committee, that there was no reason why, if you are going to extend the authority of the Federal Trade Commission over its area of appropriate jurisdiction to include supervision of certain kinds of acquisitions, that such areas should not be extended to cover the jurisdictions of all of the agencies charged with administering this portion of the act.

I believe I then called to your attention the fact that all of the other agencies mentioned herein except the Federal Reserve Board and the Federal Trade Commission do have the authority today, under their general enabling statutes, to consider in advance, if you please, whether or not an acquisition within such field would contravene the philosophy of the antitrust law as embodied in the Clayton Act. So that the only two agencies originally designated by the Congress to carry out this function which do not have the power today are the Federal Trade Commission and the Federal Reserve Board.

Now let me not make the mistake that I think I made the last time I was before this committee. The Board is not interested primarily in making this recommendation, in scrutinizing acquisition by a bank. After all, you have the State banking authorities who have policing authority over State banks and are authorized to allow mergers, and so forth, and there is jurisdiction in various of the Federal agencies to supervise and scrutinize proposed mergers and consolidations in respect to banks that are enjoying either Federal charters or Federal privileges.

I am concerned here primarily with demonstrating the existence of an evil over which there is no control, and that evil is the unbridled expansion of a bank-holding company. Congress attempted to deal with the bank-holding problem back in 1933 by enacting section 5144 of the Revised Statutes. In fact, it was the first attempt of Congress to legislate in regard to holding companies generally. You will recall in 1935 it passed the Public Utility Holding Company Act, which was in effect a dissolution act.

Unfortunately section 5144 of the Revised Statutes conferred no authority upon the Board to pass upon purchases or acquisition of banks by bank-holding companies, and the result has been that various bank-holding companies have enjoyed the privilege of purchasing banks without any limiting factors whatever.

* * * * * * *

Exhibit F

Public Law 899, 81st Congress and comparative print showing changes effected by it

AN ACT To amend an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 730), as amended

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 7 and 11 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 15, secs. 18 and 21), are hereby amended to read as follows:

"Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce

from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

"Sec. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission, or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission, or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the Commission, or Board while the same is in effect, the Commission or Board may apply to the

United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission, or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, or Board. The findings of the Commission, or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, or Board, the court may order such additional evidence to be taken before the Commission, or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission, or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28, United States Code.

"Any party required by such order of the Commission, or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission, or Board be set aside. A copy of such petitions shall be forthwith served upon the Commission, or Board, and thereupon the Commission, or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission, or Board as in the case of an application by the Commission, or Board for the enforcement of its order, and the findings of the Commission, or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

"The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission, or Board shall be exclusive.

"Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission, or Board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

"Complaints, orders, and other processes of the Commission, or Board under this section may be served by anyone duly authorized by the Commission, or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

Approved December 29, 1950, 12:50 p.m.

CHANGES IN EXISTING LAW

In compliance with rule XXIX of the Standing Rules of the Senate, as amended, there is printed below in roman existing law in which no change is proposed, with matter proposed to be stricken out enclosed in black brackets, and new matter proposed to be added shown in italic.

"SECTIONS 7 AND 11 OF AN ACT APPROVED OCTOBER 15, 1914 (38 STAT. 730), AS AMENDED

"SEC. 7. *That* no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition may be [to] substantially *to* lessen competition, [between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community,] or *to* tend to create a monopoly [of any line of commerce].

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one* [two] or more corporations engaged in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition, *of such stocks or assets,* or *of* the use of such stock by the voting or granting of proxies or otherwise, may be [to] substantially *to* lessen competition, [between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community] or *to* tend to create a monopoly [of any line of commerce].

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other [such] common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

"*Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.*

"SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics [Authority] *Board* where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"Whenever the Commission, [Authority,] or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person *and the Attorney General* a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, [Authority,] or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. *The Attorney General shall have the right to intervene and appear in said proceeding and* any person may make application, and upon good cause shown may be allowed by the Commission, [Authority,] or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in such proceeding shall be reduced to writing and filed in the office of the Commission, [Authority,] or Board. If upon such hearing the Commission, [Authority,] or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, *or other share capital, or assets*, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a [circuit court of appeals of the] United States *court of appeals* as hereinafter provided, the Commission, [Authority,] or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the Commission, [Authority,] or Board while the same is in effect, the Commission, [Authority,] or Board may apply to the [circuit court of appeals of the] United States *court of appeals* within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission, [Authority,] or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimoney, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, [Authority,] or Board. The findings of the Commission, [Authority,] or Board as to the facts, if supported by [testimony] *substantial evidence*, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, [Authority,] or Board, the court may order such additional evidence to be taken before the Commission, [Authority,] or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission, [Authority,] or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by [testimony] *substantial evidence*, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section [240 of the Judicial Code] *1254 of title 28, United States Code.*

"Any party required by such order of the Commission, [Authority,] or Board to cease and desist from a violation charged may obtain a review of such order in said [circuit court of appeals] *United States court of appeals* by filing in the court a written petition praying that the order of the Commission, [Authority,] or Board be set aside. A copy of such petition shall be forthwith served upon the Commission, [Authority,] or Board, and thereupon the Commission, [Authority,] or Board forthwith shall certify and file in the court a transcript of the

record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission, [Authority,] or Board as in the case of an application by the Commission, [Authority,] or Board for the enforcement of its order, and the findings of the Commission, [Authority,] or Board as to the facts, if supported by [testimony] *substantial evidence*, shall in like manner be conclusive.

"The jurisdiction of the [circuit court of appeals of the] United States *court of appeals* to enforce, set aside, or modify orders of the commission, [authority,] or board shall be exclusive.

"Such proceedings in the [circuit court of appeals] *United States court of appeals* shall be given precedence over [other] cases pending therein, and shall be in every way expedited. No order of the commission, [authority,] or board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

"Complaints, orders, and other processes of the commission, [authority,] or board under this section may be served by anyone duly authorized by the commission, [authority,] or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1962.

United States, Appellant, v. The Philadelphia National Bank et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[June 17, 1963.]

Mr. Justice Brennan delivered the opinion of the Court.

The United States, appellant here, brought this civil action in the United States District Court for the Eastern District of Pennsylvania under § 4 of the Sherman Act, 15 U. S. C. § 4, and § 15 of the Clayton Act, 15 U. S. C. § 25, to enjoin a proposed merger of The Philadelphia National Bank (PNB) and Girard Trust Corn Exchange Bank (Girard), appellees here. The complaint charged violations of § 1 of the Sherman Act, 15 U. S. C. § 1, and § 7 of the Clayton Act, 15 U. S. C. § 18.[1] From a judgment for appellees after trial, see 201 F. Supp. 348, the United States appealed to this Court under § 2 of the Expediting Act, 15 U. S. C. § 29. Probable jurisdiction was noted. 369 U. S. 883. We

[1] Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Section 7 of the Clayton Act provides in pertinent part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

reverse the judgment of the District Court. We hold that the merger of appellees is forbidden by § 7 of the Clayton Act and so must be enjoined; we need not, and therefore do not, reach the further question of alleged violation of § 1 of the Sherman Act.

I. The Facts and Proceedings Below.

A. *The Background: Commercial Banking in the United States.*

Because this is the first case which has required this Court to consider the application of the antitrust laws to the commercial banking industry, and because aspects of the industry and of the degree of governmental regulation of it will recur throughout our discussion, we deem it appropriate to begin with a brief background description.[2]

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[2] The discussion in this portion of the opinion draws upon undisputed evidence of record in the case, supplemented by pertinent reference materials. See Board of Govs. of the Fed. Res. System, Financing Small Business (Comm. print 1958); The Federal Reserve System (3d ed. 1954); Concentration of Banking in the United States (Comm. print 1952); Bogen, The Competitive Position of Commercial Banks (1959); Commission on Money and Credit, Money and Credit (1961); Freeman, The Problems of Adequate Bank Capital (1952); Hart, Money, Debt, and Economic Activity (2d ed. 1953); Lent, The Changing Structure of Commercial Banking (1960); Sayers, Modern Banking (5th ed. 1960); Staff of House Select Comm. on Small Business, 86th Cong., 2d Sess., Banking Concentration and Small Business (1960); U. S. Attorney General's Comm. on Administrative Procedure, Federal Control of Banking (S. Doc. No. 186, 1940); Fox, Supervision of Banking by the Comptroller of the Currency, in Public Administration and Policy Formation (Redford ed. 1956), 117; Stokes, Public Convenience and Advantage in Applications for New Banks and Branches, 74 Banking L. J. 921 (1957). For materials which focus specifically on the question of competition in the banking industry, see also Alhadeff, Monopoly and Competition in Banking (1954); Chapman, Concentration of Banking (1934); Horvitz, Concentration and

Commercial banking in this country is primarily unit banking. That is, control of commercial banking is diffused throughout a very large number of independent, local banks—13,460 of them in 1960—rather than concentrated in a handful of nationwide banks, as, for example, in England and Germany. There are, to be sure, in addition to the independent banks, some 10,000 branch banks; but branching, which is controlled largely by state law—and prohibited altogether by some States—enables a bank to extend itself only to state lines and often not that far.[3] It is also the case, of course, that many banks place loans and solicit deposits outside their home area. But with these qualifications, it remains true that ours is essentially a decentralized system of community banks. Recent years, however, have witnessed a definite trend toward concentration. Thus, during the decade ending in 1960 the number of commercial banks in the United

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Competition in New England Banking (1958); Lawrence, Banking Concentration in the United States (1930); Berle, Banking Under the Anti-Trust Laws, 49 Col. L. Rev. 589 (1949); Chandler, Monopolistic Elements in Commercial Banking, 46 J. Pol. Econ. 1 (1938); Gruis, Antitrust Laws and Their Application to Banking, 24 Geo. Wash. L. Rev. 89 (1955); Funk, Antitrust Legislation Affecting Bank Mergers, 12 Bus. Law. 496 (1957); Klebaner, Federal Control of Commercial Bank Mergers, 37 Ind. L. J. 287 (1962); Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994 (1961); Comment, Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated, 71 Yale L. J. 502 (1962); Note, Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice, 75 Harv. L. Rev. 756 (1962).

[3] In addition, there is a certain amount of bank holding company activity. The Bank Holding Company Act of 1956, 12 U. S. C. §§ 1841–1848, brought bank holding companies under stringent federal regulation. As of 1958, the 43 registered bank holding companies controlled 5.7% of all banking offices and 7.4% of all deposits. Lent, The Changing Structure of Commercial Banking (1960), 19. See also Comment, *supra*, note 2, 71 Yale L. J., at 516–522.

States declined by 714, despite the chartering of 887 new banks and a very substantial increase in the Nation's credit needs during the period. Of the 1,601 independent banks which thus disappeared, 1,503, with combined total resources of well over $25,000,000,000, disappeared as the result of mergers.

Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in, but are actually a source of money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply.[4] Furthermore, the power to accept demand deposits makes banks the intermediaries in most financial transactions (since transfers of substantial moneys are almost always by check rather than by cash) and, concomitantly, the repositories of very substantial individual and corporate funds. The banks' use of these funds is conditioned by the fact that their working capital consists very largely of demand deposits, which makes liquidity the guiding principle of bank lending and investing policies; thus it is that banks are the chief source of the country's short-term business credit.

Banking operations are varied and complex; "commercial banking" describes a congeries of services and credit devices.[5] But among them the creation of additional

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[4] Such creation is not, to be sure, pure sleight-of-hand. A bank may not make a loan without adequate reserves. Nevertheless, the element of bank money creation is real. *E. g.*, Samuelson, Economics (5th ed. 1961), 331–343.

[5] The principal banking "products" are of course various types of credit, for example: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Banking services include: acceptance of demand deposits from individuals, corporations, gov-

money and credit, the management of the checking-account system, and the furnishing of short-term business loans, would appear to be the most important. For the proper discharge of these functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests. It is therefore not surprising that commercial banking in the United States is subject to a variety of governmental controls, state and federal. Federal regulation is the more extensive, and our focus will be upon it. It extends not only to the national banks, *i. e.*, banks chartered under federal law and supervised by the Comptroller of the Currency, see 12 U. S. C. § 21 *et seq*. For many state banks, see 12 U. S. C. § 321, as well as virtually all the national banks, 12 U. S. C. § 222, are members of the Federal Reserve System (FRS), and more than 95% of all banks, see 12 U. S. C. § 1815, are insured by the Federal Deposit Insurance Corporation (FDIC). State member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks.

The governmental controls of American banking are manifold. First, the Federal Reserve System, through its open-market operations, see 12 U. S. C. §§ 263 (c), 353–359, control of the rediscount rate, see 12 U. S. C. § 357, and modifications of reserve requirements, see 12 U. S. C.

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ernmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; investment advice. It should be noted that many other institutions are in the business of supplying credit, and so more or less in competition with commercial banks (see further, pp. 34–35, *infra*), for example: mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, life insurance companies.

§§ 462, 462b, regulates the supply of money and credit in the economy and thereby indirectly regulates the interest rates of bank loans. This is not, however, rate regulation. The Reserve System's activities are only designed to influence the prime, *i. e.*, minimum, bank interest rate. There is no federal control of the maximum, although all banks, state and national, are subject to state usury laws where applicable. See 12 U. S. C. § 85. In the range between the maximum fixed by state usury laws and the practical minimum set by federal fiscal policies (there is no law against undercutting the prime rate but bankers seldom do), bankers are free to price their loans as they choose. Moreover, charges for other banking services, such as service charges for checking privileges, are free of governmental regulation, state or federal.

Entry, branching, and acquisitions are covered by a network of state and federal statutes. A charter for a new bank, state or national, will not be granted unless the invested capital and management of the applicant, and its prospects for doing sufficient business to operate at a reasonable profit, give adequate protection against undue competition and possible failure. See, *e. g.*, 12 U. S. C. §§ 26, 27, 51; 12 CFR § 4.1 (b); Pa. Stat. Ann., Tit. 7, § 819–306. Failure to meet these standards may cause the FDIC to refuse an application for insurance, 12 U. S. C. §§ 1815, 1816, and may cause the FDIC, Federal Reserve Board (FRB), and Comptroller to refuse permission to branch to insured, member, and national banks, respectively. 12 U. S. C. §§ 36, 321, 1828 (d). Permission to merge, consolidate, acquire assets, or assume liabilities may be refused by the agencies on the same grounds. 12 U. S. C. (1963 ed., Supp. IV) § 1828 (c), note 8, *infra*. Furthermore, national banks appear to be subject to state geographical limitations on branching. See 12 U. S. C. § 36 (c).

Banks are also subject to a number of specific provisions aimed at ensuring sound banking practices. For example, member banks of the Federal Reserve System may not pay interest on demand deposits, 12 U. S. C. § 371a, may not invest in common stocks or hold for their own account investment securities of any one obligor in excess of 10% of the bank's unimpaired capital and surplus, see 12 U. S. C. §§ 24 Seventh, 335, and may not pay interest on time or savings deposits above the rate fixed by the FRB, 12 U. S. C. § 371b. The payment of interest on deposits by nonmember insured banks is also federally regulated. 12 U. S. C. (1963 ed., Supp. IV) § 1828 (g); 12 CFR, 1962 Supp., § 329. In the case of national banks, the 10% limit on the obligations of a single obligor includes loans as well as investment securities. See 12 U. S. C. § 84. Pennsylvania imposes the same limitation upon banks chartered under its laws, such as Girard. Pa. Stat. Ann. (1961 Supp.), Tit. 7, § 819–1006.

But perhaps the most effective weapon of federal regulation of banking is the broad visitatorial power of federal bank examiners. Whenever the agencies deem it necessary, they may order "a thorough examination of all the affairs of the bank," whether it be a member of the FRS or a nonmember insured bank. 12 U. S. C. §§ 325, 481, 483, 1820 (b); 12 CFR §4–2. Such examinations are frequent and intensive. In addition, the banks are required to furnish detailed periodic reports of their operations to the supervisory agencies. 12 U. S. C. §§ 161, 324, 1820 (e). In this way the agencies maintain virtually a day-to-day surveillance of the American banking system. And should they discover unsound banking practices, they are equipped with a formidable array of sanctions. If in the judgment of the FRB a member bank is making "undue use of bank credit," the Board may suspend the bank from the use of the credit facilities of the FRS. 12 U. S. C. § 301. The FDIC has an even more formidable

power. If it finds "unsafe or unsound practices" in the conduct of the business of any insured bank, it may terminate the bank's insured status. 12 U. S. C. § 1818 (a). Such involuntary termination severs the bank's membership in the FRS, if it is a state bank, and throws it into receivership if it is a national bank. 12 U. S. C. § 1818 (b). Lesser, but nevertheless drastic, sanctions include publication of the results of bank examinations. 12 U. S. C. §§ 481, 1828 (f). As a result of the existence of this panoply of sanctions, recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings. 1 Davis, Administrative Law (1958), § 4.04.

Federal supervision of banking has been called "[p]robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision . . . . The system may be one of the most successful [systems of economic regulation], if not the most successful." *Id.*, § 4.04, at 247. To the efficacy of this system we may owe, in part, the virtual disappearance of bank failures from the American economic scene.[6]

B. *The Proposed Merger of PNB and Girard.*

The Philadelphia National Bank and Girard Trust Corn Exchange Bank are, respectively, the second and third largest of the 42 commercial banks with head offices in the Philadelphia metropolitan area, which consists of the City of Philadelphia and its three contiguous counties in Pennsylvania. The home county of both banks is the

[6] In 1957, for example, there were three bank suspensions in the entire country by reason of financial difficulties, in 1960, two, and in 1961, nine. Of these nine, four involved state banks which were neither members of the FRS nor insured by the FDIC. 1961 Annual Report of the Comptroller of the Currency 286. In a typical year in the 1920's, roughly 600 banks failed throughout the country, about 100 of them national banks. See S. Rep. No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 17–18.

city itself; Pennsylvania law, however, permits branching into the counties contiguous to the home county, Pa. Stat. Ann. (1961 Supp.), Tit. 7, § 819–204.1, and both banks have offices throughout the four-county area. PNB, a national bank, has assets of over $1,000,000,000, making it (as of 1959) the twenty-first largest bank in the Nation. Girard, a state bank, is a member of the FRS and is insured by the FDIC; it has assets of about $750,000,000. Were the proposed merger to be consummated, the resulting bank would be the largest in the four-county area, with (approximately) 36% of the area banks' total assets, 36% of deposits, and 34% of net loans. It and the second largest (First Pennsylvania Bank and Trust Company, now the largest) would have between them 59% of the total assets, 58% of deposits, and 58% of the net loans, while after the merger the four largest banks in the area would have 78% of total assets, 77% of deposits, and 78% of net loans.

The present size of both PNB and Girard is in part the result of mergers. Indeed, the trend toward concentration is noticeable in the Philadelphia area generally, in which the number of commercial banks has declined from 108 in 1947 to the present 42. Since 1950, PNB has acquired nine formerly independent banks and Girard six; and these acquisitions have accounted for 59% and 85% of the respective banks' asset growth during the period, 63% and 91% of their deposit growth, and 12% and 37% of their loan growth. During this period, the seven largest banks in the area increased their combined share of the area's total commercial bank resources from about 61% to about 90%.

In November 1960 the boards of directors of the two banks approved a proposed agreement for their consolidation under the PNB charter. By the terms of the agreement, PNB's stockholders were to retain their share certificates, which would be deemed to represent an equal

number of shares in the consolidated bank, while Girard's stockholders would surrender their shares in exchange for shares in the consolidated bank, receiving 1.2875 such shares for each Girard share. Such a consolidation is authorized, subject to the approval of the Comptroller of the Currency, by 12 U. S. C. (1963 ed., Supp. IV) § 215.[7] But under the Bank Merger Act of 1960, 12 U. S. C. (1963 ed., Supp. IV) § 1828 (c), the Comptroller may not give his approval until he has received reports from the other two banking agencies and the Attorney General respecting the probable effects of the proposed transaction on competition.[8] All three reports advised that the pro-

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[7] The proposed "merger" of appellees is technically a consolidation, since the resulting bank will be a different entity from either of the constituent banks, whereas if the transaction were a merger, Girard would disappear into PNB and PNB would survive. However, the proposed transaction resembles a merger very closely, in that PNB's shareholders are not to surrender their present share certificates and the resulting bank is to operate under PNB's charter. In any event, the statute treats mergers and consolidations essentially alike, compare 12 U. S. C. (1963 ed., Supp. IV) § 215 with § 215a, and it is not suggested that the legal question of the instant case would be affected by whether the transaction is technically a merger or a consolidation. Therefore, throughout this opinion we use the term "merger."

[8] Section 1828 (c) provides in pertinent part:

"No insured [by FDIC] bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District [of Columbia] bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the [Federal Deposit Insurance] Corporation if the acquiring, assuming, or resulting bank is to be a non-member insured bank (except a District bank). . . . In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the

posed merger would have substantial anticompetitive effects in the Philadelphia metropolitan area. However, on February 24, 1961, the Comptroller approved the merger. No opinion was rendered at that time. But as required by § 1828 (c), the Comptroller explained the basis for his decision to approve the merger in a statement to be included in his annual report to Congress. As to effect upon competition, he reasoned that "[s]ince there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the over-all effect upon competition would not be unfavorable." He also stated that the consolidated bank "would be far better able to serve the convenience and needs of its community by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry." The day after the Comptroller approved the

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general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection . . . . The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: . . . a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval."

merger, the United States commenced the present action. No steps have been taken to consummate the merger pending the outcome of this litigation.

C. *The Trial and the District Court's Decision.*

The Government's case in the District Court relied chiefly on statistical evidence bearing upon market structure and on testimony by economists and bankers to the effect that, notwithstanding the intensive governmental regulation of banking, there was a substantial area for the free play of competitive forces; that concentration of commercial banking, which the proposed merger would increase, was inimical to that free play; that the principal anticompetitive effect of the merger would be felt in the area in which the banks had their offices, thus making the four-county metropolitan area the relevant geographical market; and that commercial banking was the relevant product market. The defendants, in addition to offering contrary evidence on these points, attempted to show business justifications for the merger. They conceded that both banks were economically strong and had sound management, but offered the testimony of bankers to show that the resulting bank, with its greater prestige and increased lending limit,[9] would be better able to compete with large out-of-state (particularly New York) banks, would attract new business to Philadelphia, and in general would promote the economic development of the metropolitan area.[10]

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[9] See 12 U. S. C. § 84, p. 7, *supra*. The resulting bank would have a lending limit of $15,000,000, of which $1,000,000 would not be attributable to the merger but to unrelated accounting factors.

[10] There was evidence that Philadelphia, although it ranks fourth or fifth among the Nation's urban areas in terms of general commercial activity, ranks only ninth in terms of the size of its largest bank, and that some large business firms which have their head offices in Philadelphia must seek elsewhere to satisfy their banking needs because of the inadequate lending limits of Philadelphia's

Upon this record, the District Court held that: (1) the passage of the Bank Merger Act of 1960 did not repeal by implication the antitrust laws insofar as they may apply to bank mergers; (2) § 7 of the Clayton Act is inapplicable to bank mergers because banks are not corporations "subject to the jurisdiction of the Federal Trade Commission"; but assuming that § 7 is applicable: (3) the four-county Philadelphia metropolitan area is not the relevant geographical market because PNB and Girard actively compete with other banks for bank business throughout the greater part of the northeastern United States; but even assuming that § 7 is applicable and that the four-county area is the relevant market: (4) there is no reasonable probability that competition among commercial banks in the area will be substantially lessened as the result of the merger; (5) since the merger does not violate § 7 of the Clayton Act, *a fortiori* it does not violate § 1 of the Sherman Act; (6) the merger will benefit the Philadelphia metropolitan area economically. The District Court also ruled that for the purposes of § 7, commercial banking is a line of commerce; the appellees do not contest this ruling.

II. The Applicability of Section 7 of the Clayton Act to Bank Mergers.

A. *The Original Section and the 1950 Amendment.*

By its terms, the present § 7 reaches acquisitions of corporate stock or share capital by any corporation engaged

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banks; First Pennsylvania and PNB, currently the two largest banks in Philadelphia, each have a lending limit of $8,000,000. Girard's is $6,000,000.

Appellees offered testimony that the merger would enable certain economies of scale, specifically, that it would enable the formation of a more elaborate foreign department than either bank is presently able to maintain. But this attempted justification, which was not mentioned by the District Court in its opinion and has not been developed with any fullness before this Court, we consider abandoned.

in commerce, but it reaches acquisitions of corporate assets only by corporations "subject to the jurisdiction of the Federal Trade Commission." The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U. S. C. § 45 (a)(6).[11] Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7.[12] Appellant argues vigorously that a merger is crucially different from a pure assets acquisition,[13] and

[11] We reject the argument that § 11 of the Clayton Act, as amended, 15 U. S. C. § 21, confers jurisdiction over banks upon the FTC. That section provides in pertinent part: "Authority to enforce compliance with sections 13, 14, 18, and 19 of this title [§§ 2, 3, 7, and 8 of the Clayton Act, as amended] by the persons respectively subject thereto is vested . . . in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . . ." The argument is that since the FRB has no authority to enforce the Clayton Act against bank mergers, see note 22, *infra*, bank mergers must fall into the residual category of "all other character of commerce" and so be subject to the FTC. However, there is no intimation in the legislative history to the 1950 amendment to §§ 7 and 11 that the FTC's traditional lack of jurisdiction over banks was to be disturbed. Moreover, it is clear from the language of § 11 that "banks, banking associations, and trust companies" are meant to comprise a distinct "character of commerce," and so cannot be part of the "other character of commerce" reserved to the FTC.

The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that banks were already subject to extensive federal administrative controls. See *T. C. Hurst & Son* v. *Federal Trade Comm'n*, 268 F. 874, 877 (D. C. E. D. Va. 1920).

[12] No argument is made in this case that banking is not commerce, and therefore that § 7 is inapplicable; plainly, such an argument would have no merit. See *Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163, 166 (C. A. 3d Cir. 1953); cf. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533.

[13] "A merger necessarily involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's properties, with no change in corporate structure and no change in stockholder interests. Shareholders of merging

appellees argue with equal vigor that it is crucially different from a pure stock acquisition.[14] Both positions, we think, have merit; a merger fits neither category neatly. Since the literal terms of § 7 thus do not dispose of our question, we must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute. The question appears to be one of first impression; we have been directed to no previous case in which a merger or consolidation was challenged under § 7 of the Clayton Act, as amended, where the acquiring corporation was not subject to the FTC's jurisdiction.

When it was first enacted in 1914, § 7 referred only to corporate acquisitions of stock and share capital; it was silent as to assets acquisitions and as to mergers and con-

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corporations surrender their interests in those corporations in exchange for their very different rights in the resulting corporation. In an asset acquisition, however, the shareholders of the selling corporation obtain no interest in the purchasing corporation and retain no interest in the assets transferred. In a merger, unlike an asset acquisition, the resulting firm automatically acquires all the rights, powers, franchises, liabilities, and fiduciary rights and obligations of the merging firms. In a merger, but not in an asset acquisition, there is the likelihood of a continuity of management and other personnel. Finally, a merger, like a stock acquisition, necessarily involves the acquisition by one corporation of an immediate voice in the management of the business of another corporation; no voice in the decisions of another corporation is acquired by purchase of some part of its assets." Brief for the United States, 75–76.

[14] "[A] merger such as appellees' may be effected upon the affirmative vote of the holders of only two-thirds of the outstanding stock of each bank . . . but if PNB were acquiring all of the Girard stock each Girard shareholder could decide for himself whether to transfer his shares. A merger requires public notice whereas stock can be acquired privately. A shareholder dissenting from a merger has the right to receive the appraised value of his shares . . . whereas no shareholder has a comparable right in an acquisition of stock. Furthermore the corporate existence of a merged company is terminated by a merger, but remains unaffected by an acquisition of stock." Brief for Appellees, 30–31.

solidations. Act of October 15, 1914, c. 323, § 7, 38 Stat. 731–732, note 18, *infra*. It is true that the omission may not have been an oversight. Congress' principal concern was with the activities of holding companies, and specifically with the practice whereby corporations secretly acquired control of their competitors by purchasing the stock of those companies. Although assets acquisitions and mergers were known forms of corporate amalgamation at the time, their no less dangerously anticompetitive effects may not have been fully apparent to the Congress.[15] Still, the statutory language, read in the light of the overriding congressional purpose to control corporate concentrations tending to monopoly, lent itself to a construction whereby § 7 would have reached at least mergers and consolidations. It would hardly have done violence to the language so to have interpreted the vague term "share capital," see 30 Geo. Wash. L. Rev. 1024, 1027–1028 (1962), or to have adopted the view that: "where the assets are exchanged for the stock of the purchasing company, assuming that the two companies were previously in competition, it is apparent that the seller has acquired stock in a competing company . . . [and] therefore, that in effecting the merger section 7 was violated and hence the distribution of the stock received by the selling company to its shareholders and its subsequent dissolution are no bar to proceedings by the government to set aside the purchase." Handler, Industrial Mergers and the Anti-Trust Laws, 32 Col. L. Rev. 179, 266 (1932).[16]

But the courts found mergers to be beyond the reach of § 7, even when the merger technique had supplanted

[15] The legislative history of the 1914 Act is reviewed in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 313–314, and notes 22–24.

[16] In the case of an acquisition like the instant one, in which shares in the acquired corporation are to be exchanged for shares in the resulting corporation, *a fortiori* we discern no difficulty in conceptualizing the transaction as a "stock acquisition." Compare note 13, *supra*.

stock acquisitions as the prevalent mode of corporate amalgamation. *United States* v. *Celanese Corp. of America,* 91 F. Supp. 14 (D. C. S. D. N. Y. 1950); see *Thatcher Mfg. Co.* v. *Federal Trade Comm'n* and *Swift & Co.* v. *Federal Trade Comm'n,* decided together with *Federal Trade Comm'n* v. *Western Meat Co.,* 272 U. S. 554; *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Comm'n,* 291 U. S. 587.[17] As a result, § 7 became largely

[17] Statements to the same effect may be found in, *e. g., Brown Shoe Co., supra,* at 313–314, 316; *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 592; *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 507, n. 7; *United States* v. *Columbia Pictures Corp.,* 189 F. Supp. 153, 182 (D. C. S. D. N. Y. 1960). See also 33 Op. Atty. Gen. 225, 241 (1922); Hernacki, Mergerism and Section 7 of the Clayton Act, 20 Geo. Wash. L. Rev. 659, 676–677 (1952); Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994, 999–1000 (1961); Note, Section 7 of the Clayton Act: A Legislative History, 52 Col. L. Rev. 766, 768–769 (1952).

Actually, the holdings in the three cases that reached this Court, *Thatcher, Swift,* and *Arrow-Hart,* were quite narrow. See generally Note, 26 Col. L. Rev. 594–596 (1926). They were based not on a lack of substantive power under § 7, but on the enforcement section, § 11, which limited the FTC's remedial powers to "an order requiring such person to cease and desist from such violations [of §§ 2, 3, 7, and 8 of the Clayton Act], and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act." 38 Stat. 735. Faced with Congress' evident refusal to confer upon the FTC the ordinary powers of a court of equity, this Court held that unless the assets were acquired after the FTC's order of stock divestiture had been isssued (which was the case in *Federal Trade Comm'n* v. *Western Meat Co., supra,* where the Commission was sustained), the Commission could not order a divestiture of assets. Compare *Board of Govs. of the Fed. Res. Sys.* v. *Transamerica Corp.,* 184 F. 2d 311 (C. A. 9th Cir. 1950), with *Federal Trade Comm'n* v. *International Paper Co.,* 241 F. 2d 372 (C. A. 2d Cir. 1956). Since under this Court's decisions the FTC was powerless even where the transfer of assets was an evasive maneuver aimed at defeating the FTC's remedial jurisdiction over stock acquisitions violative of § 7, *a fortiori* the Commission was powerless against the typical merger. See *Arrow-Hart & Hegeman Elec. Co.* v. *Fed-*

a dead letter. Comment, 68 Yale L. J. 1627, 1629–1630 (1959); see Federal Trade Commission, The Merger Movement: A Summary Report (1948), 1, 3–6; Henderson, The Federal Trade Commission (1924), 40. Meanwhile, this Court's decision in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, stirred concern whether the Sherman Act alone was a check against corporate acquisitions. Note, 52 Col. L. Rev. 766, 768 (1952).

It was against this background that Congress in 1950 amended § 7 to include an assets-acquisition provision. Act of December 29, 1950, c. 1184, 64 Stat. 1125–1126, 15 U. S. C. § 18.[18] The legislative history is silent on the spe-

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eral Trade Comm'n, supra, at 595, 598–599. As part of the 1950 amendments to the Clayton Act, § 11 was amended to read "an order requiring such person to . . . divest itself of the stock, or other share capital, or assets, held . . . ." 15 U. S. C. § 21. Whether as an original matter *Thatcher, Swift* and *Arrow-Hart* were correctly decided is no longer an open question, since they were the explicit premise of the 1950 amendment to § 7. See *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U. S. 451, 458, p. 27, *infra.*

The question of the FTC's remedial powers under § 11 of the Clayton Act is to be distinguished from that of its remedial powers under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45 (b). In *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U. S. 619, the Court, relying on *Thatcher* and *Swift,* held that the Commission had no power to order divestiture in § 5 proceedings. But cf. *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 129–131; *Pan American World Airways* v. *United States,* 371 U. S. 296, 312, and n. 17.

[18] See note 1, *supra,* for text of amended § 7. The original § 7 read in pertinent part: "no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

The passage of the 1950 amendment followed many years of unsuccessful attempts to enact legislation plugging the assets-acquisition

cific questions why the amendment made no explicit reference to mergers, why assets acquisitions by corporations not subject to FTC jurisdiction were not included, and what these omissions signify. Nevertheless, the basic congressional design clearly emerges and from that design the answers to these questions may be inferred. Congress primarily sought to bring mergers within § 7 and thereby close what it regarded as a loophole in the section.[19] But, in addition, it sought to reach transactions such as that involved in *Columbia Steel,* which was a simple purchase of assets and not a merger.[20] In other words Congress con-

loophole. See Note, 52 Col. L. Rev. 766–767, notes 3 and 4 (1952). To be sure, the 1950 amendment was intended not only to enlarge the number of transactions covered by § 7 but also to change the test of illegality. The legislative history pertinent to the latter point is reviewed in *Brown Shoe Co., supra,* at 315–323, and is not directly relevant to the present discussion.

[19] "The purpose of the proposed legislation [the 1950 amendments to § 7] is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder [*sic*] the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law." S. Rep. No. 1775, 81st Cong., 2d Sess. 2. This theme pervaded congressional consideration of the proposed amendments. See, *e. g.,* H. R. Rep. No. 1191, 81st Cong., 1st Sess., *passim;* Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 11–13, 28–29, 39, 117; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 4–5, 15, 20, 62–63, 126–129, 139, 321; 95 Cong. Rec. 11485 (Congressman Celler, sponsor of the bill to amend § 7 in the House: "this bill seeks to plug a loophole in the present antitrust laws. . . . It is time to stop, look, and listen and to call a halt to the merger movement that is going on in this country"), 11493–11494, 11497, 11502; 96 Cong. Rec. 16433, 16443.

[20] *Columbia Steel* involved the cash purchase by United States Steel Corporation of the physical assets of Consolidated Steel Corpora-

templated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, *read together*, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum. See pp. 14–15, and notes 13, 14, *supra*. So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.

This construction is supported by a number of specific considerations.

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tion; there was no exchange of shares and no alteration of Consolidated's corporate identity. See Transcript of Record, *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (No. 461, October Term, 1947), pp. 453–475. As a result of the purchase, in its horizontal aspect, U. S. Steel controlled about 24% of the structural steel fabricating market in an 11-state western area. This Court held that the acquisition could not be reached under § 7 of the Clayton Act, see 334 U. S., at 507, n. 7, and did not violate the Sherman Act. It should be noted, however, that the Court regarded the 24% market-share figure proposed by the Government as a "doubtful assumption" and also pointed to "unusual conditions" tending to mitigate the anticompetitive effect of the acquisition. 334 U. S., at 529. *Columbia Steel* was repeatedly cited by Congressmen considering the amendment of § 7 as an example of what they conceived to be the inability of the Sherman Act, as then construed, to deal with the problems of corporate concentration. See, *e. g.*, H. R. Rep. No. 1191, 81st Cong., 1st Sess. 10–11, and n. 16; Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 28, 73; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 24; 96 Cong. Rec. 16453 (Senator Kefauver, Senate sponsor of the bill to amend § 7: "the Columbia Steel Co. case is a vivid illustration of the necessity for the proposed amendment of the Clayton Act"), 16503; and cf. 96 Cong. Rec. 16498–16499.

First. Any other construction would be illogical and disrespectful of the plain congressional purpose in amending § 7, because it would create a large loophole in a statute designed to close a loophole. It is unquestioned that the stock-acquisition provision of § 7 embraces every corporation engaged in commerce, including banks. And it is plain that Congress, in amending § 7, considered a distinction for antitrust purposes between acquisition of corporate control by purchase of stock and acquisition by merger unsupportable in reason, and sought to overrule the decisions of this Court which had recognized such a distinction.[21] If, therefore, mergers in industries outside the FTC's jurisdiction were deemed beyond the reach of § 7, the result would be precisely that difference in treat-

[21] See note 19, *supra.* The congressional attitude toward this Court's *Thatcher*, *Swift*, and *Arrow-Hart* decisions is typified in this remark of Senator O'Conor's: "The Court, in effect, said that the [Federal Trade] Commission was quite free to use the power which Congress had conferred upon it, so long as it confined the use of that power to ordering the divestiture of pieces of paper which happened to be worthless." 96 Cong. Rec. 16433. Senator O'Mahoney remarked, for example, that there was "no doubt of the fundamental fact that an innocent defect in the drafting of section 7 of the Clayton Act back in 1914 had resulted in creating a great opportunity for escape by flagrant violators of the law." 96 Cong. Rec. 16443. After sharply criticizing this Court's decisions, the Senator continued: "I take it the record is perfectly clear that what this bill purports to do is to correct an omission in the original Clayton Act. When the authors of the Clayton Act and the Congress which passed it enacted the bill into law they thought they were giving the Federal Trade Commission administrative authority to prevent monopolistic mergers . . . ." *Ibid.* So also, Senator Kefauver observed: "it would have been much better for the economy of the country to have repealed sections 7 and 11 of the Clayton Act rather than let this wide-open loophole to remain. Most of the large and monopolistic mergers which have become detrimental to the free-enterprise system of our Nation have occurred by way of this plain evasion of the intent of the original Clayton Act." 96 Cong. Rec. 16451.

ment which Congress rejected. On the other hand, excluding from the section assets acquisitions not by merger in those industries does not appear to create a lacuna of practical importance.[22]

[22] A cash purchase of another bank's assets would not seem to be a fully effective method of corporate acquisition. In other industries, a cash purchase of plant, inventory, patents, trade secrets, and the like will often directly enhance the competitive position of the acquiring corporation, as in *Columbia Steel Co.* But a bank desiring to increase its share of banking business through corporate acquisition would ordinarily need to acquire the other bank's deposits and capital, not merely its assets. For more deposits mean more working capital, and additions to capital and surplus increase the lending limit. A cash purchase, in effect, only substitutes cash for cash, since bank assets consist principally of cash and very liquid securities and loan receivables, and adds nothing to the acquiring bank's capital and surplus or to its working capital. True, an exchange of its stock for assets would achieve the acquiring bank's objectives. We are clear, however, that in light of Congress' overriding purpose, in amending § 7, to close the loophole in the original section, if such an exchange (or other clearly evasive transaction) were tantamount in its effects to a merger, the exchange would not be an "assets" acquisition within the meaning of § 7 but would be treated as a transaction subject to that section.

We have not overlooked the fact that there are corporations in other industries not subject to the FTC's jurisdiction. Chief among these are air carriers subject to the Civil Aeronautics Board and other carriers subject to the Interstate Commerce Commission. Both agencies have been given, expressly, broad powers to exempt mergers and acquisitions in whatever form from the antitrust laws. See 49 U. S. C. §§ 1378, 1384; 49 U. S. C. §§ 5 (11), 5 (13). Therefore, the exclusion of assets acquisitions in such industries from § 7 would seem to have little significance.

Section 11 of the Clayton Act, 15 U. S. C. § 21, vests the FRB with authority to enforce § 7 "where applicable to banks." This provision has been in the Act since it was first passed in 1914 and was not changed when § 7 was amended. The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted, we think, whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank

Second. The Congress which debated the bill to amend § 7 was fully aware of the important differences between a merger and a pure purchase of assets. For example, Senator Kilgore remarked:

> "When you talk about mergers, you are talking about a stock transaction.
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> . . . . .
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> ". . . [A]ctually what you do is merge the stockholdings of both corporations, and instead of that—I am thinking in practical terms—you merge the corporate entities of the two corporations and you get one corporation out of it, and you issue stock in the one corporation in lieu of the stock in the other corporation, whereupon the stock of the corporation which had been merged is canceled by the new corporation, and you have one corporation handling the operation of two. So it really is a stock transaction in the final wind-up, regardless of what you call it. But what I call a purchase of assets is where you purchase physical assets, things upon which you could lay your hand, either in the records or on the ground . . . ." Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate

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mergers. Since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions, the FRB's authority under § 11 as it existed before the 1950 amendment of § 7 remains unaffected. See, *e. g., Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163 (C. A. 3d Cir. 1953).

Nothing in this opinion, of course, limits the power of the FTC, under §§ 7 and 11, as amended, to reach any transaction, including mergers and consolidations, in the broad range between and including pure stock and pure assets acquisitions, where the acquiring corporation is subject to the FTC's jurisdiction, see 15 U. S. C. § 45 (6), and to order divestiture of the stock, share capital, or assets acquired in the transaction, see 15 U. S. C. § 21.

Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 176; to the same effect, see, *e. g., id.*, at 100, 139, 320–325.

Plainly, acquisition of "assets" as used in amended § 7 was not meant to be a simple equivalent of acquisition by merger, but was intended rather to ensure against the blunting of the antimerger thrust of the section by evasive transactions such as had rendered the original section ineffectual. Thus, the stock-acquisition provision of § 7, though reenacted *in haec verba* by the 1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer. And see note 22, *supra*. This seems to be the point of Congressman Patman's remark, typical of many, that: "What this bill does is put all corporate mergers on the same footing, whether the result of the acquisitions of stock or the acquisition of physical assets." Hearings, *supra*, at 126. To the same effect is the House Report on the bill to amend § 7: "The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only the purchase of assets or stock but also any other method of acquisition . . . . It forbids not only direct acquisitions but also indirect acquisitions . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8–9.

Third. The legislative history shows that the objective of including the phrase "corporation subject to the jurisdiction of the Federal Trade Commission" in § 7 was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hearings, debates, and committee reports was upon the powers

of the FTC. The decisions of this Court which had uncovered the loophole in the original § 7—*Thatcher, Swift,* and *Arrow-Hart*—had not rested directly upon the substantive coverage of § 7, but rather upon the limited scope of the FTC's divestiture powers under § 11. See note 17, *supra.* There were intimations that the *courts'* power to enforce § 7 might be far greater. See *Thatcher Mfg. Co.* v. *Federal Trade Comm'n, supra,* at 561; *Swift & Co.* v. *Federal Trade Comm'n, supra,* at 563; *Federal Trade Comm'n* v. *Eastman Kodak Co.,* 274 U. S. 619, 624; *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Comm'n, supra,* at 598–599; Irvine, The Uncertainties of Section 7 of the Clayton Act, 14 Cornell L. Q. 28 (1928). Thus, the loophole was sometimes viewed as primarily a gap in the FTC's jurisdiction.[23] Furthermore, although the Clayton Act has always provided for dual enforcement by court and agency, see 15 U. S. C. § 25; *United States* v. *W. T. Grant Co.,* 345 U. S. 629; *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 208, prior to the 1950 amendment enforcement of § 7 was left largely to the FTC. Martin, Mergers and the Clayton Act (1959), 205, 219; Montague, The Celler Anti-Merger Act: An Administrative Problem in an Economic Crisis, 37 A. B. A. J. 253

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[23] See, *e. g.,* statement of Assistant Attorney General Bergson: "If it [§ 7] is to have any significant effect for the future, it is essential that it be amended so that the Federal Trade Commission will be in a position to deal with the merger problem as it exists today." Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, p. 28. See also 96 Cong. Rec. 16437, 16452–16453; 95 Cong. Rec. 11490–11491, 11499, 11504 (Representative Byrne: "the suggested amendment to sections 7 and 11 of the Clayton Act would merely give the [Federal Trade] Commission the same power in regard to asset acquisitions that it already possesses over acquisitions of stock. This would close the loophole and restore meaning to the statute.").

(1951). And the impetus to amend § 7 came in large part from the FTC. See, *e. g.*, Martin, *supra,* 187–194; Federal Trade Commission, Annual Reports, 1928, pp. 18–19; 1940, pp. 12–13; 1948, pp. 11–22; The Merger Movement: A Summary Report (1948). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction. Congress' choice of this means of underscoring the FTC's role in enforcing § 7 provides no basis for a construction which would undercut the dominant congressional purpose of eliminating the difference in treatment accorded stock acquisitions and mergers by the original § 7 as construed.

Fourth. It is settled law that "[i]mmunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Comm'n,* 369 U. S. 482, 485. Cf. *United States* v. *Borden Co.,* 308 U. S. 188, 198–199; *United States* v. *Southern Pac. Co.,* 259 U. S. 214, 239–240. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry from the stock-acquisition as well as the assets-acquisition provision.

Of course, our construction of the amended § 7 is not foreclosed because, after the passage of the amendment, some members of Congress, and for a time the Justice Department, voiced the view that bank mergers were still beyond the reach of the section.[24] "[T]he views of a sub-

[24] See, *e. g.*, Staff of Subcommittee No. 5 of House Committee on the Judiciary, 82d Cong., 2d Sess., Bank Mergers and Concentration of Banking Facilities (1952) vii; H. R. 5984, printed in 102

sequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price,* 361 U. S. 304, 313; see *Rainwater* v. *United States,* 356 U. S. 590, 593; *United States* v. *United Mine Workers,* 330 U. S. 258, 282; cf. *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 590. This holds true even though misunderstanding of the scope of § 7 may have played some part in the passage of the Bank Merger Act of 1960.[25] There is a question, to which we shall shortly turn, whether there exists such inconsistency between the Bank Merger Act and § 7, as we now construe it, as to require a holding that § 7 must be deemed repealed *pro tanto;* but that is a different question from whether misunderstanding of the scope of § 7 is relevant to our task of defining what scope Congress gave the section in 1950. When Congress enacted the Bank Merger Act, the applicability of § 7 to bank mergers was still to be authoritatively determined; it was a subject of speculation. Thus, this is not a case in which our "earlier decisions are part of the arch on which the new structure rests, [and] we [must] refrain from disturbing them lest we change the design that Congress fashioned." *State Board of Ins.* v. *Todd Shipyards Corp.,* 370 U. S. 451, 458. Cf. note 17, *supra.* The design fashioned in the Bank Merger Act was predicated upon uncertainty as to the scope of § 7, and we do no violence to that design by dispelling the uncertainty.

Cong. Rec. 2108–2109 (1956); Hearings before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957, 85th Cong., 1st Sess., pt. 2, p. 1030 (testimony of Attorney General Brownell); H. R. Rep. No. 1416, Regulation of Bank Mergers, 86th Cong., 2d Sess. 9; S. Rep. No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 1–2, 5.

[25] See, *e. g.*, remarks of Representative Spence: "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 Cong. Rec. 7257 (1960). See also note 24, *supra*.

B. *The Effect of the Bank Merger Act of 1960.*

Appellees contended below that the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, 12 U. S. C. (1963 ed., Supp. IV) § 1828 (c), note 8, *supra,* immunizes approved mergers from challenge under the federal antitrust laws.[26] We think the District Court was correct in rejecting this contention. No express immunity is conferred by the Act.[27] Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored,[28] and

[26] This contention was abandoned on appeal. We consider it, nevertheless, because it touches the proper relations of the judicial and administrative spheres. *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 63.

[27] Contrast this with the express exemption provisions of, *e. g.*, the Federal Aviation Act, 49 U. S. C. § 1384; Federal Communications Act, 47 U. S. C. §§ 221 (a), 221 (c)(1); Interstate Commerce Act, 49 U. S. C. §§ 5 (11), 5b (9), 22; Federal Maritime Act, 46 U. S. C. (1962 ed. Supp. III) § 814; Webb-Pomerene Act, 15 U. S. C. § 62; and the Clayton Act itself, § 7, 15 U. S. C. § 18.

[28] See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 314–315; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 343 (plurality opinion), 374–376 (dissenting opinion); *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 105, 107; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, 161–162; *Central Transfer Co.* v. *Terminal Railroad Assn.*, 288 U. S. 469, 474–475; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 513–515; *United States* v. *Borden Co.*, 308 U. S. 188, 197–206; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226–228; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–457; *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 205–206; *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 809–810; *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1; *United States* v. *Radio Corp. of America,* 358 U. S. 334; *Maryland & Va. Milk Producers Assn.* v. *United States,* 362 U. S. 458, 464–467; *California* v. *Federal Power Comm'n,* 369 U. S. 482; *Pan American World Airways* v. *United States,* 371 U. S. 296, 304, 305; *Silver* v. *New York Stock Exchange,* 373 U. S. —.

have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.[29] Two recent cases, *Pan American World Airways* v. *United States*, 371 U. S. 296, and *California* v. *Federal Power Comm'n*, 369 U. S. 482, illustrate this principle. In *Pan American*, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers; in contrast, the banking agencies have authority neither to enforce the antitrust laws against mergers, cf. note 22, *supra*, nor to grant immunity from those laws.

In the *California* case, on the other hand, the Court held that the FPC's approval of a merger did not confer immunity from § 7 of the Clayton Act, even though, as in the instant case, the agency had taken the competitive factor into account in passing upon the merger application. See 369 U. S., at 484–485, 487–488. We think *California* is controlling here. Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision.[30] Plainly, the

[29] See, *e. g.*, *Keogh* v. *Chicago & N. W. R. Co.*, *supra*, at 163; *Pan American World Airways* v. *United States*, *supra*, at 309–310. Cf. *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

[30] With respect to the question (upon which we intimate no view) whether judicial review of the Comptroller's decision is possible notwithstanding the absence of a specific provision, see Note, 75 Harv. L. Rev. 756, 762–763 (1962); Note, 37 N. Y. U. L. Rev. 735, 750, n. 95 (1962); cf. 1 Davis, Administrative Law (1958), § 4.04.

range and scope of administrative powers under the Bank Merger Act bear little resemblance to those involved in *Pan American.*

Nor did Congress, in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure. On the contrary, the legislative history to the Act seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected. Both the House and Senate Committee Reports stated that the Act would not affect in any way the applicability of the antitrust laws to bank acquisitions. H. R. Rep. No. 1416, 86th Cong., 2d Sess. 9; S. Rep. No. 196, 86th Cong., 1st Sess. 3. See also, *e. g.*, 105 Cong. Rec. 8131 (remarks of Senator Robertson, the Act's sponsor). Moreover, bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject. Rate regulation in the banking industry is limited and largely indirect, see p. 6, *supra;* banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business—place loans and solicit deposits—where they please. The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition. Indeed, that there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws. Cf. Kaysen and Turner, Antitrust Policy (1959), 206.

We note, finally, that the doctrine of "primary jurisdiction" is not applicable here. That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. See *Far East Conference* v. *United States,* 342 U. S. 570; *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 464 (1954).[31] Court jurisdiction is not thereby ousted, but only postponed. See *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, 433; *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U. S. 481, 498–499; 3 Davis, Administrative Law (1958), 1–55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies,[32] the present action would not be barred for the agency proceeding was completed before the antitrust action was commenced. Cf. *United States* v. *Western Pac. R. Co.,* 352 U. S. 59, 69; *Retail Clerks Int'l Assn.* v. *Schermerhorn,* — U. S. —, —. We recognize that the practical effect of applying the doctrine of pri-

[31] See generally Jaffe, Primary Jurisdiction Reconsidered: The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577 (1954); Latta, Primary Jurisdiction in the Regulated Industries and the Antitrust Laws, 30 U. of Cin. L. Rev. 261 (1961); Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Col. L. Rev. 673 (1958).

[32] In *California* v. *Federal Power Comm'n,* the Court held that the FPC must stay its proceeding on a merger application until the completion of a pending antitrust suit by the Justice Department; *a fortiori,* the court entertaining the suit would not be required to abstain pending consideration of the merger application by the FPC. We need not and do not consider the question whether the *California* decision would control here had the Comptroller been denied an opportunity to approve the merger before the antitrust suit was commenced.

mary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see *Federal Maritime Bd.* v. *Isbrandtsen Co., supra;* cf. *D. L. Piazza Co.* v. *West Coast Line, Inc.,* 210 F. 2d 947 (C. A. 2d Cir. 1954), or even to preclude such enforcement entirely if the agency has the power to approve the challenged activities, see *United States Nav. Co.* v. *Cunard S. S. Co.,* 284 U. S. 474; cf. *United States* v. *Railway Express Agency,* 101 F. Supp. 1008 (D. C. D. Del. 1951); but see *Federal Maritime Bd.* v. *Isbrandtsen Co., supra.* But here there may be no power of judicial review of the administrative decision approving the merger, and such approval does not in any event confer immunity from the antitrust laws, see pp. 28–30, *supra.* Furthermore, the considerations that militate against finding a repeal of the antitrust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws.

It should be unnecessary to add that in holding as we do that the Bank Merger Act of 1960 does not preclude application of § 7 of the Clayton Act to bank mergers, we deprive the later statute of none of its intended force. Congress plainly did not intend the 1960 Act to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects. For example, Congress certainly knew that bank mergers would continue subject to the Sherman Act, see p. 30, *supra,* as well as that pure stock acquisitions by banks would continue subject to § 7 of the Clayton Act. If, in addition, bank mergers are subject to § 7, we do not see how the objectives of the 1960 Act are thereby thwarted. It is not as if the Clayton and Sherman Acts embodied approaches to antitrust policy inconsistent with or unrelated to each other. The Sherman Act, of course, forbids mergers effecting an unreasonable restraint of trade. See, *e. g., Northern*

Securities Co. v. *United States,* 193 U. S. 197; *United States* v. *Union Pac. R. Co.,* 226 U. S. 61; indeed, there is presently pending before this Court a challenge to a bank merger predicated solely on the Sherman Act. *United States* v. *First Nat. Bank & Trust Co. of Lexington,* prob. juris. noted, *post,* p. —. And the tests of illegality under the Sherman and Clayton Acts are complementary. "[T]he public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets . . . violates the prohibitions of the Sherman Act against unreasonable restraints." *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 507, n. 7; see Note, 52 Col. L. Rev. 766, 768, n. 10 (1952). To be sure, not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act; our point is simply that since Congress passed the 1960 Act with no intention of displacing the enforcement of the Sherman Act against bank mergers—or even of § 7 against pure stock acquisitions by banks—continued application of § 7 to bank mergers cannot be repugnant to the design of the 1960 Act. It would be anomalous to conclude that Congress, while intending the Sherman Act to remain fully applicable to bank mergers, and § 7 of the Clayton Act to remain fully applicable to pure stock acquisitions by banks, nevertheless intended § 7 to be completely inapplicable to bank mergers.

III. The Lawfulness of the Proposed Merger Under Section 7.

The statutory test is whether the effect of the merger "may be substantially to lessen competition" "in any line of commerce in any section of the country." We analyzed the test in detail in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, and that analysis need not be repeated or extended here, for the instant case presents only a straightforward problem of application to particular facts.

We have no difficulty in determining the "line of commerce" (relevant product or services market) and "section of the country" (relevant geographical market) in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking," see note 5, *supra*, composes a distinct line of commerce. Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are invariably much higher than the banks', in part, it seems, because the companies' working capital consists in substantial part of bank loans.[33] Finally, there are banking facilities which,

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[33] Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 425 (C. A. 2d Cir. 1945). In the instant case, unlike *Aluminum Co.*, there is virtually no time lag between the banks' furnishing competing financial institutions (small-loan companies, for example) with the raw material, *i. e.*, money, and the institutions' selling the finished product, *i. e.*, loans; hence the instant case, compared with *Aluminum Co.* in this respect, is *a fortiori*. As one banker testified quite frankly in the instant case in response to the question: "Do you feel that you are in substantial competition with these institutions [personal-finance and sales-finance companies] that you lend . . . such money to for loans that you want to make?"—"Oh, no, we definitely do not. If we did, we would stop making the loans to them." (R. 298.) The reason for the competitive disadvantage of most lending institutions *vis-à-vis* banks is that only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, by virtue of their unique power to accept demand deposits. The critical

although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits.[34] In sum, it is clear that commercial banking is a market "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corp.* v. *Federal Trade Comm'n*, 296 F. 2d 800, 811 (C. A. 9th Cir. 1961).

We part company with the District Court on the determination of the appropriate "section of the country." The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. See Bock, Mergers and Markets (1960), 42. This depends upon "the geographic structure of supplier-customer relations." Kaysen and Turner, Anti-

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area of short-term commercial credit, see pp. 4–5, *supra*, appears to be one in which banks have little effective competition, save in the case of very large companies which can meet their financing needs from retained earnings or from issuing securities or paper.

[34] As one witness for the defendants testified:

"We have had in Philadelphia for 50 years or more the mutual savings banks offering ½ per cent and in some instances more than ½ per cent higher interest than the commercial banks. Nevertheless, the rate of increase in savings accounts in commercial banks has kept pace with and in many of the banks exceeded the rate of increase of the mutual banks paying 3½ per cent. . . .

"I have made some inquiries. There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 per cent, and one is a mutual savings bank offering 3½. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get ½ of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level." (R. 1388–1389.)

trust Policy (1959), 102. In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance.[35] See *Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163, 169 (C. A. 3d Cir. 1953). The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries. See, *e. g.*, *American*

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[35] Consider the following colloquy between governmental counsel and a witness for the defendants:

"Q. What do you consider to be the area of a branch office?

"A. Well, there is no set rule on that. We hope to have an area from 1½ to 2 miles.

"However, we have opened branches directly in the communities where other banks are established, in fact, across the street from them because it is not only a question of getting new business, it's a question of servicing and retaining the accounts that we now have.

. . . . .

"Q. And your business is not necessarily dependent upon it [the customer] being within a mile or two of a branch, is it?

"A. To a large degree, it is, because we found that we were losing deposit accounts regularly from our in-town offices because other banks were opening or had offices in other sections of the city; and in order to retain those accounts and to get additional business we felt it was necessary to establish branches." (R. 1815.)

As far as the customer for a bank loan is concerned, "the size of his market is somewhat dependent upon his own size, how well he is known, and so on. For example, for small business concerns known primarily locally, they may consider that their market is a strictly local one, and they may be forced by circumstances to do business with banks in a nearby geographic relationship to them. On the other hand, as businesses increase in size, the scope of their business activities, their national reputation, the alternatives they have available to them will be spread again over a very large area, possibly as large as the entire United States." (R. 1372.) (Defendants' testimony on direct examination.)

Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (D. C. S. D. N. Y. 1957), aff'd, 259 F. 2d 524 (C. A. 2d Cir. 1958). Therefore, since as we recently said in a related context the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*," *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 327 (emphasis supplied); see *Standard Oil Co.* v. *United States*, 337 U. S. 293, 299 and 300, n. 5, the four-county area in which appellees' offices are located would seem to be the relevant geographical market. Cf. *Brown Shoe Co., supra*, at 338–339. In fact, the vast bulk of appellees' business originates in the four-county area.[36] Theoretically, we should be concerned with the possibility that bank offices on the perimeter of the area may be in

[36] The figures for PNB and Girard respectively are: 54% and 63% of the dollar volume of their commercial and industrial loans originate in the four-county area; 75% and 70%, personal loans; 74% and 84%, real estate loans; 41% and 62%, lines of credit; 94% and 72%, personal trusts; 81% and 94%, time and savings deposits; 56% and 77%, demand deposits; 93% and 87%, demand deposits of individuals. Actually, these figures may be too low. The evidence discloses that most of the business done outside the area is with large borrowers and large depositors; appellees do not, by and large, deal with small businessmen and average individuals not located in the four-county area. For example, of appellees' combined total business demand deposits under $10,000, 94% originate in the four-county area. This reinforces the thesis that the smaller the customer, the smaller is his banking market geographically. See note 35, *supra*.

The appellees concede that the four-county area has sufficient commercial importance to qualify, under *Brown Shoe Co., supra*, at 336–337, as a "section of the country" within the meaning of § 7. See *Maryland & Va. Milk Producers Assn.* v. *United States*, 362 U. S. 458, 469; cf. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 279.

effective competition with bank offices within; actually, this seems to be a factor of little significance.[37]

We recognize that the area in which appellees have their offices does not delineate with perfect accuracy an appropriate "section of the country" in which to appraise the effect of the merger upon competition. Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers

[37] Appellees suggest not that bank offices skirting the four-county area provide meaningful alternatives to bank customers within the area, but that such alternatives are provided by large banks, from New York and elsewhere, which solicit business in the Philadelphia area. There is no evidence of the amount of business done in the area by banks with offices outside the area; it may be that such figures are unobtainable. In any event, it would seem from the local orientation of banking insofar as smaller customers are concerned, see notes 35 and 36, *supra*, that competition from outside the area would only be important to the larger borrowers and depositors. If so, the four-county area remains a valid geographical market in which to assess the anticompetitive effect of the proposed merger upon the banking facilities available to the smaller customer—a perfectly good "line of commerce," in light of Congress' evident concern, in enacting the 1950 amendments to § 7, with preserving small business. See *Brown Shoe Co., supra*, at 315–316. As a practical matter the small businessman can only satisfy his credit needs at local banks. To be sure, there is still some artificiality in deeming the four-county area the relevant "section of the country" so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate relevant geographical market. Note, 52 Col. L. Rev. 766, 778–779, n. 77 (1952). And it is notable that outside the four-county area, appellees' business rapidly thins out. Thus, the other six counties of the Delaware Valley account for only 2% of appellees' combined individual demand deposits; 4%, demand deposits of partnerships and corporations; 7%, loans; 2%, savings deposits; 4%, business time deposits.

of intermediate size, it would appear, deal with banks within an area intermediate between these extremes. See notes 35–37, *supra*. So, also, some banking services are evidently more local in nature than others. But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered. We think that the four-county Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate "section of the country" in which to appraise the instant merger than any larger or smaller or different area. Cf. Hale and Hale, Market Power: Size and Shape Under the Sherman Act (1958), 119. We are helped to this conclusion by the fact that the three federal banking agencies regard the area in which banks have their offices as an "area of effective competition." Not only did the FDIC and FRB, in the reports they submitted to the Comptroller of the Currency in connection with appellees' application for permission to merge, so hold, but the Comptroller, in his statement approving the merger, agreed: "With respect to the effect upon competition, there are three separate levels and effective areas of competition involved. These are the national level for na-

tional accounts, the regional or sectional area, and the local area of the City of Philadelphia and the immediately surrounding area."

Having determined the relevant market, we come to the ultimate question under § 7: whether the effect of the merger "may be substantially to lessen competition" in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency." See *Brown Shoe Co., supra,* at 317, 322. Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. See generally Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960). And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. See *Crown Zellerbach Corp.* v. *Federal Trade Comm'n,* 296 F. 2d 800, 826–827 (C. A. 9th Cir. 1961). So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. *Standard Oil Co.* v. *United States,* 337 U. S. 293, 313. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration. See *Union Carbide Corp.,* Trade Reg. Rep., FTC Complaints and Orders, 1961–1963, ¶ 15503, at 20375–20376 (concurring opinion). This is such a case.

We noted in *Brown Shoe Co., supra,* at 315, that "[t]he dominant theme pervading congressional consideration of

the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. See *United States* v. *Koppers Co.*, 202 F. Supp. 437 (D. C. W. D. Pa. 1962).

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration. Furthermore, the test is fully consonant with economic theory.[38] That "[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share," [39] is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute.

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[38] See Kaysen and Turner, Antitrust Policy (1959), 133; Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa. L. Rev. 176, 182 (1955); Bok, *supra*, at 308–316, 328. Cf. Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal, 43 Va. L. Rev. 489, 521–522 (1957).

[39] Comment, "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers, 68 Yale L. J. 1627, 1638–1639 (1959); see, *e. g.*, Machlup, The Economics of Sellers' Competition (1952), 84–93, 333–336; Bain, Barriers to New Competition (1956), 27. Cf. Mason, Market Power and Business Conduct: Some Comments, 46–2 Am. Econ. Rev. (1956), 471.

The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area.[40] Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.[41]

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[40] See p. 9, *supra*. We note three factors that cause us to shade the percentages given earlier in this opinion, in seeking to calculate market share. (1) The percentages took no account of banks which do business in the four-county area but have no offices there; however, this seems to be a factor of little importance, at least insofar as smaller customers are concerned, see note 37, *supra*. (2) The percentages took no account of banks which have offices in the four-county area but not their home offices there; however, there seem to be only two such offices and appellees in this Court make no reference to this omission. (3) There are no percentages for the amount of business of banks located in the area, other than appellees, which originates in the area. Appellees contend that since most of the 40 other banks are smaller, they do a more concentratedly local business than appellees, and hence account for a relatively larger proportion of such business. If so, we doubt much correction is needed. The five largest banks in the four-county area at present control some 78% of the area banks' assets. Thus, even if the small banks have a somewhat different pattern of business, it is difficult to see how that would substantially diminish the appellees' share of the local banking business.

No evidence was introduced as to the quantitative significance of these three factors, and appellees do not contend that as a practical matter such evidence could have been obtained. Under the circumstances, we think a downward correction of the percentages to 30% produces a conservative estimate of appellees' market share.

[41] Kaysen and Turner, *supra*, note 38, suggest that 20% should be the line of prima facie unlawfulness; Stigler suggests that any acquisition by a firm controlling 20% of the market after the merger is presumptively unlawful; Markham mentions 25%. Bok's principal test is increase in market concentration, and he suggests a figure of 7% or 8%. And consult note 20, *supra*. We intimate no view on the validity of such tests for we have no need to consider percentages smaller than those in the case at bar, but we note that such tests are more rigorous than is required to dispose of the instant case. Needless to say, the fact that a merger results in a less-than-30% market

Further, whereas presently the two largest banks in the area (First Pennsylvania and PNB) control between them approximately 44% of the area's commercial banking business, the two largest after the merger (PNB-Girard and First Pennsylvania) will control 59%. Plainly, we think, this increase of more than 33% in concentration must be regarded as significant.[42]

Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of § 7 nor the legislative history suggests that any particular percentage share was deemed critical. The House Report states that the tests of illegality under amended § 7 "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Accordingly, we have relied upon decisions under these other sections in applying § 7. See *Brown Shoe Co., supra, passim;* cf. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 595, and n. 15. In *Standard Oil Co.* v. *United States,* 337 U. S. 293, cited in S. Rep. No. 1775, 81st Cong., 2d Sess. 6, this Court held violative of § 3 of the Clayton Act exclusive contracts whereby the defendant company, which accounted for 23% of the sales in the relevant market and, together

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share, or in a less substantial increase in concentration than in the instant case, does not raise an inference that the merger is *not* violative of § 7. See, *e. g., Brown Shoe Co., supra.*

[42] See note 41, *supra.* It is no answer that, among the three presently largest firms (First Pennsylvania, PNB, and Girard), there will be no increase in concentration. If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. Comment, note 39, *supra,* at 1644.

with six other firms, accounted for 65% of such sales, maintained control over outlets through which approximately 7% of the sales were made. In *Federal Trade Comm'n v. Motion Picture Adv. Serv. Co.*, 344 U. S. 392, we held unlawful, under § 1 of the Sherman Act and § 5 of the Federal Trade Commission Act, rather than under § 3 of the Clayton Act, exclusive arrangements whereby the four major firms in the industry had foreclosed 75% of the relevant market; the respondent's market share, evidently, was 20%. Kessler and Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 53 n. 231 (1959). In the instant case, by way of comparison, the four largest banks after the merger will foreclose 78% of the relevant market. P. 9, *supra*. And in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, the Court held violative of § 3 a series of exclusive contracts whereby a single manufacturer controlled 40% of the industry's retail outlets. Doubtless these cases turned to some extent upon whether "by the nature of the market there is room for newcomers." *Federal Trade Comm'n* v. *Motion Picture Adv. Serv. Co.*, *supra*, at 395. But they remain highly suggestive in the present context, for as we noted in *Brown Shoe Co.*, *supra*, at 322, n. 55, integration by merger is more suspect than integration by contract, because of the greater permanence of the former. The market share and market concentration figures in the contract-integration cases, taken together with scholarly opinion, see notes 41 and 42, *supra*, support, we believe, the inference we draw in the instant case from the figures disclosed by the record.

There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages. There was, to be sure, testimony by bank officers to the effect that competition among banks in Philadelphia was vigorous and would continue to be vigorous after the merger. We think, however, that the District Court's reliance on such evidence was misplaced.

This lay evidence on so complex an economic-legal problem as the substantiality of the effect of this merger upon competition was entitled to little weight, in view of the witnesses' failure to give concrete reasons for their conclusions.[43]

Of equally little value, we think, are the assurances offered by appellees' witnesses that customers dissatisfied with the services of the resulting bank may readily turn to the 40 other banks in the Philadelphia area. In every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in view of the strong trend toward mergers evident in the area, see p. 9, *supra;* and we might note also that entry of new competitors into the banking field is far from easy.[44]

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[43] The fact that some of the bank officers who testified represented small banks in competition with appellees does not substantially enhance the probative value of their testimony. The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served. See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 588, 592 (D. C. S. D. N. Y. 1958). "[C]ongressional concern [was] with the protection of *competition*, not *competitors*." *Brown Shoe Co.*, *supra*, at 320. In an oligopolistic market, small companies may be perfectly content to follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive.

[44] Entry is, of course, wholly a matter of governmental grace. See p. 6, *supra*. In the 10-year period ending in 1961, only one new bank opened in the Philadelphia four-county area. That was in 1951. At the end of 10 years, the new bank controlled only one-third of 1% of the area's deposits.

So also, we reject the position that commercial banking, because it is subject to a high degree of governmental regulation, or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is somehow immune from the anticompetitive effects of undue concentration. Competition among banks exists at every level—price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services—and it is keen; on this appellees' own witnesses were emphatic.[45]

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[45] The following colloquy is representative:

"Q. Mr. Jennings, what is the nature of competition among commercial banks?

"A. Keen, highly competitive. I think, from my own observation, that I have never known competition among banks to be keener than it is today. . . .

"Q. In what area does competition exist? . . .

"A. I think the stiffest, sternest competition of all is in the field to obtain demand deposits and loans. . . .

"Q. What form does the competition take?

"A. It takes many forms. If we are dealing with the deposits of large corporations, wealthy individuals, I would say that most, if not all, of the major banks of the country are competing for such deposits. The same would hold true as regards loans to those corporations or wealthy individuals.

"If we go into the field of smaller loans, smaller deposits, the competition is more regional—wide but nevertheless regional—and there the large banks as well as the small banks are after that business with everything they have.

. . .

"Q. What form does the competition take? Is it competition in price?

"A. No, I wouldn't say that it is competition as to price. After all, interest rates are regulated at the top level by the laws of the 50 states. Interest rates at the bottom level have no legal limitation, but for practical purposes the prime rate . . . furnishes a very effective floor. I would say that the area of competition for interest

There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical. For example, banks compete to fill the credit needs of businessmen. Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. See note 35, *supra*. If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-à-vis* larger businesses with which he competes. In

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rates would range between, let us say, the prime rate of 4½ and 6 per cent for normal loans exclusive of consumer loans, where higher rates are permitted.

. . . . .

"In the area of service charges, I would say that banks are competitive in that field. They base their service charges primarily on their costs, but they have to maintain a weather eye to windward as to what the competitors are charging in the service charge field. The minute they get out of line in connection with service charges they find their customers will start to protest, and if something isn't done some of the customers will leave them for a differential in service charges of any significance.

"I do not believe that competition is really affected by the price area. I think it is affected largely by the quality and the caliber of service that banks give and whether or not they feel they are being received in the right way, whether they are welcome in the bank. Personalities enter into it very heavily, but I do not think price as such is a major factor in banking competition. It is there, it is a factor, but not major." (R. 1940–1942.)

It should be noted that besides competition in interest rates, there is a great deal of indirect price competition in the banking industry. For example, the amount of compensating balance a bank requires of a borrower (*i. e.*, the amount the borrower must always retain in his demand deposit account with the bank), affects the real cost of the loan, and varies considerably in the bank's discretion.

this fashion, concentration in banking accelerates concentration generally.

We turn now to three affirmative justifications which appellees offer for the proposed merger. The first is that only through mergers can banks follow their customers to the suburbs and retain their business. This justification does not seem particularly related to the instant merger, but in any event it has no merit. There is an alternative to the merger route: the opening of new branches in the areas to which the customers have moved—so-called *de novo* branching. Appellees do not contend that they are unable to expand thus, by opening new offices rather than acquiring existing ones, and surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.

Second, it is suggested that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state bank, particularly the New York banks, for very large loans. We reject this application of the concept of "countervailing power." Cf. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U. S. 211. If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that market. Nor is it a case in which lack of adequate banking facilities is causing hardships to individuals or businesses in the community. The present two largest banks in Philadelphia have lending limits of $8,000,000 each.

The only businesses located in the Philadelphia area which find such limits inadequate are large enough readily to obtain bank credit in other cities.

This brings us to appellees' final contention, that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. See p. 12 and note 10, *supra*. We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

In holding as we do that the merger of appellees would violate § 7 and must therefore be enjoined, we reject appellees' pervasive suggestion that application of the procompetitive policy of § 7 to the banking industry will have dire, although unspecified, consequences for the national economy. Concededly, PNB and Girard are healthy and strong; they are not undercapitalized or overloaned; they have no management problems; the Philadelphia area is not overbanked; ruinous competition is not in the offing. Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary.[46] It does

[46] Thus, arguably, the so-called failing-company defense, see *International Shoe Co.* v. *Federal Trade Comm'n*, 280 U. S. 291, 299–303, might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with

require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry. The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so. At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy. Cf. *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 4. There is no warrant for declining to enforce it in the instant case.

The judgment of the District Court is reversed and the case remanded with direction to enter judgment enjoining the proposed merger.

It is so ordered.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

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ordinary business failures. But the question what defenses in § 7 actions must be allowed in order to avert unsound banking conditions is not before us, and we intimate no view upon it.

SUPREME COURT OF THE UNITED STATES

No. 83.—OCTOBER TERM, 1962.

United States, Appellant, v. The Philadelphia National Bank et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[June 17, 1963.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court.

In response to an apparently accelerating trend toward concentration in the commercial banking system in this country, a trend which existing laws were evidently ill-suited to control, numerous bills were introduced in Congress from 1955 to 1960.[1] During this period, the Department of Justice and the federal banking agencies[2] advocated divergent methods of dealing with the competitive aspects of bank mergers, the former urging the extension of § 7 of the Clayton Act to cover such mergers and the latter supporting a regulatory scheme under which the effect of a bank merger on competition would be only one of the factors to be considered in determining whether the merger would be in the public interest. The Justice Department's proposals were repeatedly rejected by Congress, and the regulatory approach of the banking agencies

[1] See Wemple & Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994, 995 (1961). Many of the bills are summarized in Funk, Antitrust Legislation Affecting Bank Mergers, 75 Banking L. J. 369 (1958).

[2] These agencies and the areas of their primary supervisory responsibility are: (1) the Comptroller of the Currency—national banks; (2) the Federal Reserve System—state Reserve-member banks; (3) the FDIC—insured nonmember banks.

was adopted in the Bank Merger Act of 1960. See *infra*, pp. 7–11.

Sweeping aside the "design fashioned in the Bank Merger Act" as "predicated upon uncertainty as to the scope of § 7" of the Clayton Act (*ante*, p. 27), the Court today holds § 7 to be applicable to bank mergers and concludes that it has been violated in this case. I respectfully submit that this holding, which sanctions a remedy regarded by Congress as inimical to the best interests of the banking industry and the public, and which will in large measure serve to frustrate the objectives of the Bank Merger Act, finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute.

I.

The key to this case is found in the special position occupied by commercial banking in the economy of this country. With respect to both the nature of the operations performed and the degree of governmental supervision involved, it is fundamentally different from ordinary manufacturing and mercantile businesses.

The unique powers of commercial banks to accept demand deposits, provide checking account services, and lend against fractional reserves permit the banking system as a whole to create a supply of "money," a function which is indispensable to the maintenance of the structure of our national economy. And the amount of the funds held by commercial banks is very large indeed; demand deposits alone represent approximately three-fourths of the money supply in the United States.[3] Since a bank's assets must be sufficiently liquid to accommodate demand withdrawals, short-term commercial and industrial loans are the major element in bank portfolios, thus making commercial banks the principal source of short-

[3] Samuelson, Economics (5th ed. 1961), p. 311.

term business credit. Many other services are also provided by banks, but in these more or less collateral areas they receive more active competition from other financial institutions.[4]

Deposit banking operations affect not only the volume of money and credit, but also the value of the dollar and the stability of the currency system. In this field, considerations other than simply the preservation of competition are relevant. Moreover, commercial banks are entrusted with the safekeeping of large amounts of funds belonging to individuals and corporations. Unlike the ordinary investor, these depositors do not regard their funds as subject to a risk of loss and, at least in the case of demand depositors, they do not receive a return for taking such a risk. A bank failure is a community disaster; its impact first strikes the bank's depositors most heavily, and then spreads throughout the economic life of the community.[5] Safety and soundness of banking practices are thus critical factors in any banking system.

The extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition, reflects these factors. Since the Court's opinion describes, at some length, aspects of the supervision exercised by the federal banking agencies (*ante*, pp. 5–8), I do no more here than point out that, in my opinion, such regulation evidences a plain design grounded on solid economic considerations to deal with banking as a specialized field.

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[4] For example, savings and loan associations, credit unions, and other institutions compete with banks in installment lending to individuals, and banks are in competition with individuals in the personal trust field.

[5] Since bank insolvencies destroy sources of credit, not only borrowers but also others who rely on the borrowers' ability to secure loans may be adversely affected. See Berle, Banking Under the Anti-Trust Laws, 49 Col. L. Rev. 589, 592 (1949).

This view is confirmed by the Bank Merger Act of 1960 and its history.

Federal legislation dealing with bank mergers [6] dates from 1918, when Congress provided that, subject to the approval of the Comptroller of the Currency, two or more national banks could consolidate to form a new national bank; [7] similar provision was made in 1927 for the consolidation of a state and a national bank resulting in a national bank.[8] In 1952 mergers of national and state banks into national banks were authorized, also conditioned on approval by the Comptroller of the Currency.[9] In 1950 Congress authorized the theretofore prohibited [10] merger or consolidation of a national bank with a state bank when the assuming or resulting bank would be a state bank.[11] In addition, the Federal Deposit Insurance Act was amended to require the approval of the FDIC for all mergers and consolidations between insured and noninsured banks, and of specified federal banking agencies for conversions of insured banks into insured state banks if the conversion would result in the capital stock or surplus of the newly formed bank being less than that of the converting bank.[12] The Act further required insured banks merging with insured state banks

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[6] The term "merger" is generally used throughout this opinion to designate any form of corporate amalgamation. See note 7 in the Court's opinion, *ante*, p. 10. Occasionally, however, as in the above paragraph, the terms "merger" and "consolidation" are used in their technical sense.

[7] 40 Stat. 1043, as amended, 12 U. S. C. § 215.

[8] 44 Stat. 1225, as amended, 12 U. S. C. § 215.

[9] 66 Stat. 599, as amended, 12 U. S. C. § 215a.

[10] See Paton, Conversion, Merger and Consolidation Legislation—"Two-Way Street" For National and State Banks, 71 Banking L. J. 15 (1954).

[11] 64 Stat. 455, as amended, 12 U. S. C. § 214a.

[12] 64 Stat. 457; see 64 Stat. 892 (now 74 Stat. 129, 12 U. S. C. (Supp. IV, 1963), § 1828 (c)).

to secure the approval of the Comptroller of the Currency if the assuming bank would be a national bank, and the approval of the Board of Governors of the Federal Reserve System and the FDIC, respectively, if the assuming or resulting bank would be a state member bank or nonmember insured bank.[13]

None of this legislation prescribed standards by which the appropriate federal banking agencies were to be guided in determining the significance to be attributed to the anticompetitive effects of a proposed merger. As previously noted (*supra*, p. 1), Congress became increasingly concerned with this problem in the 1950's. The antitrust laws apparently provided no solution; in only one case prior to 1960, *United States* v. *Firstamerica Corp.*, Civil No. 38139, N. D. Cal., March 30, 1959, settled by consent decree, had either the Sherman or Clayton Act been invoked to attack a commercial bank merger.

Indeed the inapplicability to bank mergers of § 7 of the Clayton Act, even after it was amended in 1950, was, for a time, an explicit premise on which the Department of Justice performed its antitrust duties. In passing upon an application for informal clearance of a bank merger in 1955, the Department stated:

> "After a complete consideration of this matter, we have concluded that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act. For this reason this Department does not presently plan to take any action on this matter." Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 3, p. 2141 (1955).

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[13] *Ibid.* However, under the Act, insured banks merging with insured state banks did not have to obtain approval unless the capital stock or surplus of the resulting or assuming bank would be less than the aggregate capital stock or surplus of all the merging banks.

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And in testifying before the Senate Committee on Banking and Currency in 1957 Attorney General Brownell, speaking of bank mergers, noted:

> "On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that asset acquisitions by banks are not covered by section 7 [of the Clayton Act] as amended in 1950." Hearings on the Financial Institutions Act of 1957 before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 2, p. 1030 (1957).

Similar statements were repeatedly made to Congress by Justice Department representatives in the years prior to the enactment of the Bank Merger Act.[14]

The inapplicability of § 7 to bank mergers was also an explicit basis on which Congress acted in passing the Bank Merger Act of 1960. The Senate Report on S. 1062, the bill that was finally enacted, stated:

> "Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from section 7 of the Clayton Act. (Stock acquisitions by bank holding companies, as distinguished from mergers and consolidations, are subject to both the Bank Holding Company Act of 1956 and sec. 7 of the Clayton Act.)" S. Rep. No. 196, 86th Cong., 1st Sess. 1–2 (1959).
>
> "In 1950 (64 Stat. 1125) section 7 of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section,

[14] See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 1, pp. 243–244 (1955); Hearings on S. 3911 before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 2d Sess. 60–61, 84 (1956); Hearings on S. 1062 before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. 9 (1959).

> in addition to stock acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of that act, were not affected)." *Id.*, at 5.[15]

During the floor debates Representative Spence, the Chairman of the House Committee on Banking and Currency, recognized the same difficulty: "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 Cong., Rec. 7257 (1960).[16]

But instead of extending the scope of § 7 to cover bank mergers, as numerous proposed amendments to that section were designed to accomplish,[17] Congress made the

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[15] See also H. R. Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960) ("The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help."); *id.*, at 9 ("Because section 7 [of the Clayton Act] is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers 'little help,' in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers.").

[16] In the Senate, a sponsor of S. 1062, Senator Fulbright, reported that the "1950 amendment to section 7 of the Clayton Act, which for the first time imposed controls over mergers by means other than stock acquisitions, did not apply to bank mergers which are practically invariably accomplished by means other than stock acquisition. Accordingly for all practical purposes bank mergers have been and still are exempt from section 7 of the Clayton Act." 106 Cong. Rec. 9711 (1960).

[17] *E. g.*, H. R. 5948, 84th Cong. 1st Sess. (1955); S. 198, 85th Cong., 1st Sess. (1957); S. 722, 85th Cong., 1st Sess. (1957); see note 1, *supra*.

deliberate policy judgment that "it is impossible to sub-
ject bank mergers to the simple rule of section 7 of the
Clayton Act. Under that act, a merger would be barred
if it might tend substantially to lessen competition, re-
gardless of the effects on the public interest." 105 Cong.
Rec. 8076 (1959) (remarks of Senator Robertson,
sponsor of S. 1062). Because of the peculiar nature
of the commercial banking industry, its crucial role in
the economy, and its intimate connection with the
and monetary operations of the Government,
rejected the notion that the general economic
ness premises of the Clayton Act should be the
siderations applicable to this field. Unrestric
competition was thought to have been a major
the panic of 1907 and of the bank failures of
and was regarded as a highly undesirable
impose on banks in the future:

> "Banking is too important to deposit
> to the Government, and the public
> mit unregulated and unrestricted
> field.

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[18] S. Rep. No. 196, 86th Cong., 1st
again the Nation has suffered from the
uncontrolled competition in the field of
ciently regulated competition. . . . The
ber of small weak banks, to such a large
could not effectively supervise them
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"The antitrust laws have reflected an awareness of the difference between banking and other regulated industries on the one hand, and ordinary unregulated industries and commercial enterprises on the other hand." 106 Cong. Rec. 9711 (1960) (remarks of Senator Fulbright, a sponsor of S. 1062).

"It is this distinction between banking and other businesses which justifies different treatment for bank mergers and other mergers. It was this distinction that led the Senate to reject the flat prohibition of the Clayton Act test which applies to other mergers." *Id.*, at 9712.[19]

Thus the Committee on Banking and Currency recommended "continuance of the existing exemption from section 7 of the Clayton Act." 105 Cong. Rec. 8076 (1959). Congress accepted this recommendation; it decided to handle the problem of concentration in commercial banking "through banking laws, specially framed to fit the particular needs of the field . . . ." S. Rep. No. 196, 86th Cong., 1st Sess. 18 (1959). As finally enacted in 1960, the Bank Merger Act embodies the regulatory approach advocated by the banking agencies, vesting in them responsibility for its administration and placing the scheme within the framework of existing banking laws as an amendment to § 18 (c) of the Federal Deposit Insurance Act, 12 U. S. C. (Supp. IV, 1963), § 1828 (c).[20] It maintains the latter Act's requirement of advance approval by the appropriate federal agency for mergers between insured banks and between insured and noninsured

[19] See also S. Rep. No. 196, 86th Cong., 1st Sess. 16 (1959): "But it is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest."

[20] For the pertinent text of the statute, see note 8 in the Court's opinion, *ante*, pp. 10–11.

banks (*supra,* pp. 4–5), but establishes that such approval is necessary in every merger of this type. To aid the respective agencies in determining whether to approve a merger, and in "the interests of uniform standards." (12 U. S. C. (Supp. IV, 1963), § 1828 (c)), the Act requires the two agencies not making the particular decision and the Attorney General to submit to the immediately responsible agency reports on the competitive factors involved. It further provides that in addition to considering the banking factors examined by the FDIC in connection with applications to become an insured bank, which focus primarily on matters of safety and soundness,[21] the approving agency "shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest." 12 U. S. C. (Supp. IV, 1963), § 1828 (c).

The congressional purpose clearly emerges from the terms of the statute and from the committee reports, hearings, and floor debates on the bills. Time and again it was repeated that effect on competition was *not to be the controlling factor* in determining whether to approve a bank merger, that a merger could be approved as being in the public interest even though it would cause a substantial lessening of competition. The following statement is typical:

> "The committee wants to make crystal clear its intention that the various banking factors in any par-

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[21] These factors are: "the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter." 12 U. S. C. (Supp. IV, 1963), § 1828 (c). Compare § 6 of the Federal Deposit Insurance Act, 12 U. S. C. § 1816.

ticular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision. And, of course, the banking agencies are not bound in their consideration of the competitive factors by the report of the Attorney General." S. Rep. No. 196, 86th Cong., 1st Sess. 24 (1959); *id.*, at 19, 21.[22]

The foregoing statement also shows that it was the congressional intention to place the responsibility for approval squarely on the banking agencies; the report of the Attorney General on the competitive aspects of a merger was to be advisory only.[23] And there was deliberately omitted any attempt to specify or restrict the kinds of circumstances in which the agencies might properly determine that a proposed merger would be in the public interest notwithstanding its adverse effect on competition.[24]

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[22] See also 106 Cong. Rec. 7259 (1960): "The language of S. 1062 as amended by the House Banking and Currency Committee and as it appears in the bill we are now about to pass in the House makes it clear that the competitive and monopolistic factors are to be considered along with the banking factors and that after considering all of the factors involved, if the resulting institution will be in the public interest, then the application should be approved and otherwise disapproved."

[23] 106 Cong. Rec. 7257 (1960): "This puts the responsibility for acting on a proposed merger where it belongs—in the agency charged with supervising and examining the bank which will result from the merger. Out of their years of experience in supervising banks, our Federal banking agencies have developed specialized knowledge of banking and the people who engage in it. They are experts at judging the condition of the banks involved, their prospects, their management, and the needs of the community for banking services. They should have *primary responsibility* in deciding whether a proposed merger would be in the public interest." (Emphasis added.)

[24] H. R. Rep. No. 1416, 86th Cong., 2d Sess. 11–12 (1960): "We are convinced, also, that approval of a merger should depend on a positive showing of some benefit to be derived from it. As previously

What Congress has chosen to do about mergers and their effect on competition in the highly specialized field of commercial banking could not be more "crystal clear." (*Supra,* p. 10.) But in the face of overwhelming evidence to the contrary, the Court, with perfect equanimity, finds "uncertainty" in the foundations of the Bank Merger Act (*ante,* p. 27) and on this premise puts it aside as irrelevant to the task of construing the scope of § 7 of the Clayton Act.

I am unable to conceive of a more inappropriate case in which to overturn the considered opinion of all concerned as to the reach of prior legislation.[25] For 10 years everyone—the department responsible for antitrust law enforcement, the banking industry, the Congress, and the bar—proceeded on the assumption that the 1950 amendment of the Clayton Act did not affect bank mergers. This assumption provided a major impetus to the enactment of remedial legislation, and Congress, when it finally settled on what it thought was the solution to the problem at hand, emphatically rejected the remedy now brought to life by the Court.

The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy. As the present case illustrates, the Attorney General's report to the designated banking agency is no longer truly advisory, for if the agency's decision is not

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indicated, your committee is not prepared to say that the cases enumerated in the hearings are the only instances in which a merger is in the public interest, nor are we prepared to devise a specific and exclusive list of situations in which a merger should be approved."

[25] Compare *State Board of Ins.* v. *Todd Shipyards Corp.,* 370 U. S. 451, in which this Court refused to reconsider certain prior decisions because Congress had "posited a regime of state regulation" of the insurance business on their continuing validity. Cf. *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356.

satisfactory a § 7 suit may be commenced immediately.[26] The bank merger's legality will then be judged solely from its competitive aspects, unencumbered by any considerations peculiar to banking.[27] And if such a suit were deemed to lie after a bank merger has been consummated, there would then be introduced into this field, for the first time to any significant extent, the threat of divestiture of assets and all the complexities and disruption attendant upon the use of that sanction.[28] The only vestige of the Bank Merger Act which remains is that the banking agencies will have an initial veto.[29]

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[26] If a bank merger such as this falls within the category of a "stock" acquisition, a § 7 suit to enjoin it may be brought not only by the Attorney General, but by the Federal Reserve Board as well. See § 11 of the Clayton Act, 15 U. S. C. § 21 (vesting authority in the Board to enforce § 7 "where applicable to banks"). In an attempt to retain some semblance of the structure erected by Congress in the Bank Merger Act, the Court states that it "supplanted . . . whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers." *Ante*, p. 22, note 22. Since both the Attorney General and the Federal Reserve Board have purely advisory roles where a bank merger will result in a national bank, the Court's reasoning with respect to the effect of the Bank Merger Act upon enforcement authority should apply with equal force to both.

[27] Indeed the Court has erected a simple yardstick in order to alleviate the agony of analyzing economic data—control of 30% of a commercial banking market is prohibited. *Ante*, pp. 41–42.

[28] Although § 7 of the Clayton Act is applicable to an outright purchase of bank stock, this form of amalgamation is infrequently used in the banking field and does not involve divestiture problems of the same magnitude as does an asset acquisition.

[29] It is true, as the Court points out (*ante*, p. 32), that Congress, in enacting the Bank Merger Act, agreed that the applicability of the Sherman Act to banking should not be disturbed. See, *e. g.*, 105 Cong. Rec. 8076 (1959). But surely this alone provides no conceivable justification for applying the Clayton Act as well. Apart from the fact that the Sherman Act covers many kinds of restraints besides mergers, one of the sponsors of the Bank Merger Act (Sen-

This frustration of a manifest congressional design is, in my view, a most unwarranted intrusion upon the legislative domain. I submit that *whatever* may have been the congressional purpose in 1950, Congress has now so plainly pronounced its current judgment that bank mergers are not within the reach of § 7 that this Court is duty bound to effectuate its choice.

But I need not rest on this proposition, for, as will now be shown, there is nothing in the 1950 amendment to § 7 or its legislative history to support the conclusion that Congress even then intended to subject bank mergers to this provision of the Clayton Act.

II.

Prior to 1950 § 7 of the Clayton Act read, in pertinent part, as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of

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ator Fulbright) expressed his expectation that in a Sherman Act case a bank merger would not be subjected to strict antitrust standards to the exclusion of all other considerations: "And even if the Sherman Act is held to apply to banking and to bank mergers, it seems clear that under the rule of reason spelled out in the Standard Oil case, different considerations will be found applicable, in a regulated field like banking, in determining whether activities would 'unduly diminish competition,' in the words of the Supreme Court in that case." 106 Cong. Rec. 9711 (1960). Moreover, this Court has recognized in other areas that it may be necessary to accommodate the Sherman Act to regulatory policy. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 83; *Federal Communications Comm'n* v. *RCA Communications, Inc.,* 346 U. S. 86, 91–92. See also *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 527. And of course the Sherman Act is concerned more with existing anticompetitive effects than with future probabilities, and thus would not reach incipient restraints to the same extent as would § 7 of the Clayton Act. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 317–318 and notes 32, 33.

such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

In 1950 this section was amended to read (the major amendments being indicated in italics):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

If Congress did intend the 1950 amendment to reach bank mergers, it certainly went at the matter in a very peculiar way. While prohibiting asset acquisitions having the anticompetive effects described in § 7, it limited the applicability of that provision to corporations subject to the jurisdiction of the Federal Trade Commission, which does not include banks. And it reenacted the stock-acquisition provision in the very same language which—as it was fully aware—had been interpreted not to reach the type of merger customarily used in the banking industry. See *infra,* pp. 18–21. In the past this Court has drawn the normal inference that such a reenactment indicates congressional adoption of the prior judicial statutory construction. *E. g., United States* v. *Dixon,* 347 U. S. 381; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 131–132.

In this instance, however, the Court holds that the stock-acquisition provision underwent an expansive metamorphosis, so that it now embraces all mergers or consolidations involving an exchange of stock. Since bank mergers usually, if not always, do involve exchanges of stock, the effect of this construction is to rob the Federal Trade Commission provision relating to asset-acquisitions of all force as a substantive limitation upon the scope of § 7; according to the Court the purpose of that provision was merely to ensure the Commission's role in the enforcement of § 7. *Ante,* pp. 24–26. In short, under this reasoning bank mergers to all intents and purposes are fully within the reach of § 7.

A more circumspect look at the 1950 amendment of § 7 and its background will show that this construction is not tenable.

The language of the stock-acquisition provision itself is hardly congenial to the Court's interpretation. The PNB-Girard merger is technically a consolidation, governed by § 20 of the national banking laws, 12 U. S. C. (Supp. IV, 1963), § 215. Under that section, the corporate existence of both PNB and Girard, all of their rights, franchises, assets, and liabilities, would be automatically vested in the resulting bank, which would operate under the PNB charter. PNB itself would acquire nothing. Rather, the two banks would be creating a new entity by the amalgamation of their properties, and the subsequent conversion of Girard stock (which would then represent ownership in a nonfunctioning entity) into stock of the resulting bank would simply be part of the mechanics by which ownership in the new entity would be reflected. Clearly this is not a case of a corporation acquiring the stock of another functioning corporation, which is the only situation where "the *effect* of . . . [a

stock] acquisition may be substantially to lessen competition." (Emphasis added.)

There are further crucial differences between a merger and a stock acquisition. A merger normally requires public notice, the approval of the holders of two-thirds of the outstanding shares of each bank, and dissenting shareholders have the right to receive in cash the appraised value of their shares.[30] A purchase of stock may be done privately, and the only approval involved is that of the individual parties to the transaction. Unlike a merged company, a corporation whose stock is acquired usually remains in business as a subsidiary of the acquiring corporation.[31]

The Government, however, contends that a merger more closely resembles a stock acquisition than an asset acquisition because of one similarity of central importance: the acquisition by one corporation of an immediate voice in the management of the business of another corporation. But this is obviously true *a fortiori* of asset acquisitions of sufficient magnitude to fall within the prohibition of § 7; if a corporation buys the plants, equipment, inventory, etc., of another corporation, it acquires absolute control over, not merely a voice in the management of, another business.

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[30] In these respects a merger is precisely the contrary of what § 7 was originally designed to proscribe—the secret acquisition of corporate control. See the Court's opinion, *ante*, p. 16.

[31] That the stock-acquisition provision was not intended to cover mergers is strongly suggested by the second paragraph of § 7: "No corporation shall acquire . . . any part of the stock . . . of one or more corporations . . . where . . . the effect . . . of *the use* of such stock by the voting or granting of proxies . . . may be substantially to lessen competition, or to tend to create a monopoly." 15 U. S. C. § 18. (Emphasis added.) After a merger has been consummated, the resulting corporation holds no stock in any party to the merger; thus there can be in this situation no such thing as a restraint of trade by "the use" of the voting power of acquired stock.

The legislative history of the 1950 amendment also unquestionably negates any inference that Congress intended to reach bank mergers. It is true that the purpose was "to plug a loophole" in § 7 (95 Cong. Rec. 11485 (1949) (remarks of Representative Celler)). But simply to state this broad proposition does not answer the precise questions presented here: what was the nature of the loophole sought to be closed; what were the means chosen to close it?

The answer to the latter question is unmistakably indicated by the relationship between the 1950 amendment and previous judicial decisions. In *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Comm'n,* 291 U. S. 587, this Court, by a divided vote, ruled on the scope of the Federal Trade Commission's remedial powers under the original Clayton Act. After the Commission had issued a § 7 complaint against a holding company which had been formed by the stockholders of two manufacturing corporations, steps were taken to avoid the Commission's jurisdiction. Two new holding companies were formed, each acquired all the common stock of one of the manufacturing companies, and each issued its stock directly to the stockholders of the original holding company. This company then dissolved and the two new holding companies and their respective manufacturing subsidiaries merged into one corporation. This Court held that the Commission had no authority, after the merger, to order the resulting corporation to divest itself of assets. An essential part of this holding was that the merger in question, which was technically a consolidation similar to that here planned by PNB and Girard, was not a stock acquisition within the prohibitions of § 7: "If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any antitrust law, as to which we express no opinion, it was necessarily a violation of statutory prohibitions other

than those found in the Clayton Act." 291 U. S., at 599; see *id.*, at 595.[32]

This decision, along with two others earlier handed down by this Court (*Thatcher Mfg. Co.* v. *Federal Trade Comm'n* and *Swift & Co.* v. *Federal Trade Comm'n*, decided together with *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U. S. 554), perhaps provided more of a spur to enactment of the "assets" amendment to § 7 than any other single factor. These decisions were universally regarded as opening the unfortunate loophole whereby § 7 could be evaded through the use of an asset acquisition. Representative Celler expressed the view of Congress in this fashion:

> "The result of these decisions has so weakened sections 7 and 11 . . . as to give to the Federal Trade Commission and the Department of Justice merely a paper sword to prevent improper mergers." 95 Cong. Rec. 11485 (1949).[33]

Since this Court's decisions were cast in terms of the scope of the Federal Trade Commission's jurisdiction,

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[32] On this point, the dissenters agreed: "It is true that the Clayton Act does not forbid corporate mergers. . . ." 291 U. S., at 600. See also *United States* v. *Celanese Corp. of America*, 91 F. Supp. 14.

[33] See also Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 38–39 (1949); Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 109–110 (1950): "The loophole sought to be filled resulted from a series of Supreme Court decisions. (*Swift & Co.* v. *FTC* and *Thatcher Mfg. Co.* v. *FTC* (272 U. S. 544); *Arrow-Hart & Hegeman Co.* v. *FTC* (291 U. S. 587).) In these decisions the Supreme Court held that section 7 of the Clayton Act, while prohibiting the acquisition of stock of a competitor, gave the Federal Trade Commission no authority under section 11 to order divestiture of assets which had been acquired before a cease-and-desist order was issued, even though the acquisition resulted from the voting of illegally held stock."

Congress, in amending § 7 so as to close that gap, emphasized its expectation—made plain in the committee reports, hearings, and debates—that the Commission would assume the principal role in enforcing the section.[34] Implicit here is that no change in the enforcement powers of the other agencies named in § 11 was contemplated.[35] Of more importance, the legislative history demonstrates that it was the asset-acquisition provision that was designed to plug the loophole created by *Thatcher, Swift,* and *Arrow.* Although *Arrow,* unlike *Thatcher* and *Swift,* involved a consolidation of the same type as the PNB-Girard merger, the members of Congress drew no distinction among these cases, invariably discussing all three of them in the same breath as examples of asset acquisitions.[36] Indeed, the House report stated that

> "the Supreme Court . . . held [in *Arrow*] that if an acquiring corporation secured *title to the physical assets* of a corporation whose stock it had acquired before the Federal Trade Commission issues its final order, the Commission lacks power to direct divestiture of the physical assets . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 5 (1949). (Emphasis added.)

And on the Senate floor it was pointed out that "the *method* by which . . . [the merger in *Arrow*] had been accomplished was an innocent one . . . ." 96 Cong. Rec.

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[34] The Federal Trade Commission had assumed primary enforcement responsibility before the 1950 amendment. See Martin, Mergers and the Clayton Act (1959), p. 197.

[35] Compare note 26, *supra.*

[36] See note 33 *supra;* Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 97 (1950). And this Court has, after the 1950 amendment, described *Arrow* as a case involving an asset acquisition. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 313 and note 20.

16505 (1950). (Emphasis added.) Clearly the understanding of Congress was that a consolidation of two corporations was an acquisition of assets.[37]

Nor did Congress act inadvertently or without purpose in limiting the asset-acquisition provision to corporations subject to the jurisdiction of the Federal Trade Commission, thereby excluding bank mergers. The reports, hearings, and debates on the 1950 amendment reveal that Congress was then concerned with the rising tide of *industrial* concentration—*i. e.,* "the external expansion . . . through mergers, acquisitions, and consolidations"[38] of corporations engaged in manufacturing, mining, merchandising, and of other kindred commercial endeavors. Specialized areas of the economy such as banking were not even considered. Thus the Federal Trade Commission's 1948 report on mergers recounted the statistics on concentration in a multitude of industries—*e. g.,* steel, cement, electrical equipment, food and dairy products, tobacco, textiles, paper, chemicals, rubber—but included not one figure on banking concentration.[39] This report was repeatedly cited and heavily relied on by members of Congress and others to demonstrate the mag-

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[37] The single excerpt quoted by the Court (*ante*, p. 23) casts no doubt on this proposition, for Senator Kilgore's remark occurred in the course of a discussion in which he was trying to make the point that there is no difference in *practical* effect, as opposed to the legal distinction, between a merger and a stock acquisition. Thus at the end of the paragraph quoted by the Court the Senator stated: ". . . I cannot see how on earth you can get the idea that the purchase of the stock of the corporation, all of it, does not carry with it the transfer of all of the physical assets in that corporation." Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 176 (1950).

[38] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949).

[39] Federal Trade Commission, The Merger Movement: A Summary Report (1948), *passim*.

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nitude of the merger movement and the economic dangers it presented.[40] In the committee hearings the focus was exclusively upon amalgamation in the ordinary commercial fields,[41] and similarly the Senate and House reports spoke solely of industrial concentration as the evil to be remedied.[42] On the floor of the House, Representative Celler indicated the extent of concentration of industrial power:

> "Four companies now have 64 percent of the steel business, four have 82 percent of the copper business, two have 90 percent of the aluminum business, three have 85 percent of the automobile business, two have 80 percent of the electric lamp business, four have 75 percent of the electric refrigerator business, two have 80 percent of the glass business, four have 90 percent of the cigarette business, and so forth.
>
> "The antitrust laws are a complete bust unless we pass this bill." 95 Cong. Rec. 11485 (1949).

The legislatory history is thus singularly devoid of any evidence that Congress sought to deal with the special problem of banking concentration.

I do not mean to suggest, of course, that § 7 of the Clayton Act is thereby rendered applicable only to ordinary commercial and industrial corporations and not to firms in any "regulated" sector of the economy. The

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[40] *E. g.*, Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 39–40 (1949); 95 Cong. Rec. 11503 (1949); 96 Cong. Rec. 16505 (1950).

[41] Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 5–6, 17, 57–59 (1950); Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 40, 113 (1949).

[42] S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950); H. R. Rep. No. 1191, 81st Cong., 1st Sess. 2–3 (1949).

point is that when Congress included in § 7 asset acquisitions by corporations subject to the Federal Trade Commission's jurisdiction, and at the same time continued in § 11 the Federal Reserve Board's jurisdiction over banks, it was not acting irrationally. Rather, the absence of any mention of banks in the legislative history of the 1950 amendment, viewed in light of the prior congressional treatment of banking as a distinctive area with special characteristics and needs, compels the conclusion that bank mergers were simply not then regarded as part of the loophole to be plugged.[43]

This conclusion is confirmed by a number of additional considerations. It was not until *after* the passage of the 1950 amendment of § 7 that Representative Celler, its co-sponsor, requested the staff of the Antitrust Subcommittee of the House Committee on the Judiciary "to prepare a report indicating the concentration existing in our banking system." Staff of Subcommittee No. 5, House Committee on the Judiciary, 82d Cong., 2d Sess., Report on Bank Mergers and Concentration of Banking Facilities III (1952). The introduction to the report reveals that:

> "On March 21, 1945, the Board of Governors of the Federal Reserve System wrote to the chairman of the Committee on the Judiciary requesting that the provisions of H. R. 2357, Seventy-ninth Congress, first session, one of the early predecessors of the Celler Antimerger Act, be extended so as to include corporations subject to the jurisdiction of the Federal Reserve Board under section 11 of the Clayton Act. Because of the revisions made in subsequent versions of antimerger bills, however, it became impracticable

[43] It is interesting to note that in the same year in which § 7 was amended Congress passed an act *facilitating* certain kinds of bank mergers which had theretofore been prohibited. See note 11, *supra*, and accompanying text.

> to include within the scope of the act corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by section 11 of the Clayton Act, are therefore circumscribed insofar as mergers are concerned only by the old provisions of section 7, and certain additional statutes which do not presently concern themselves substantively with the question of competition in the field of banking." *Id.*, at VII.

It is also worth noting that in 1956 Representative Celler himself introduced another amendment to § 7, explaining that "all the bill [H. R. 5948] does is plug a loophole in the present law dealing with bank mergers . . . . This loophole exists because section 7 prohibits bank mergers . . . only if such mergers are accomplished by stock acquisition." 102 Cong. Rec. 2109 (1956). The bill read in pertinent part: "[N]o bank . . . shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce . . . ." *Ibid.* The amendment passed the House but was defeated in the Senate.

For all these reasons, I think the conclusion is inescapable that § 7 of the Clayton Act does not apply to the PNB-Girard merger. The Court's contrary conclusion seems to me little better than a *tour de force.*[44]

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[44] Since the Court does not reach the Sherman Act aspect of this case, it would serve no useful purpose for me to do so.

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1962.

United States, Appellant, v. The Philadelphia National Bank et al.	On Appeal From the United States District Court for The Eastern District of Pennsylvania.

[June 17, 1963.]

Memorandum of Mr. Justice Goldberg.

I agree fully with my Brother Harlan that § 7 of the Clayton Act has no application to bank mergers of the type involved here, and I therefore join in the conclusions expressed in his opinion on that point. However, while I thus dissent from the Court's holding with respect to the applicability of the Clayton Act to this merger, I wish to make clear that I do not necessarily dissent from its judgment invalidating the merger. To do so would require me to conclude in addition that on the record as it stands the Government has failed to prove a violation of the Sherman Act, which is fully applicable to the commercial banking business. In my opinion there is a substantial Sherman Act issue in this case, but since the Court does not reach it and since my views relative thereto would be superfluous in light of today's disposition of the case, I express no ultimate conclusion concerning it. Compare *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 585 (Murphy, J., dissenting); *Poe* v. *Ullman*, 367 U. S. 497, 555 (Stewart, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1963.

United States, Appellant, v. First National Bank and Trust Company of Lexington et al. } On Appeal From the United States District Court for the Eastern District of Kentucky.

[April 6, 1964.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a civil suit in which the United States charges that the consolidation of First National Bank and Trust Co. of Lexington, Kentucky (First National), and Security Trust Co. of Lexington (Security Trust), to form First Security National Bank and Trust Co. (First Security), constitutes a combination in restraint of trade and commerce in violation of § 1 of the Sherman Act and a combination and an attempt to monopolize trade and commerce in violation of § 2 of that Act.[1] 26 Stat. 209 as amended, 15 U. S. C. §§ 1, 2.

The plan of consolidation was submitted to the Comptroller of the Currency and he, pursuant to the provision of the Bank Merger Act of 1960, 74 Stat. 129, 12 U. S. C. (Supp. IV) § 1828 (c), requested and received reports of

[1] Sections 1 and 2 of the Sherman Act provide in pertinent part:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

the probable competitive effects of the proposed consolidation from the Attorney General, the Federal Deposit Insurance Corp., and the Board of Governors of the Federal Reserve System. Each report concluded that the consolidation would adversely affect competition among commercial banks in Fayette County. Nevertheless, the Comptroller of the Currency approved the consolidation on February 27, 1961; it was effected March 1, and this Sherman Act suit was filed the same day. The District Court, while agreeing that the Comptroller of the Currency's approval of the consolidation did not render it immune from challenge under the Sherman Act,[2] held that no violation of that Act had been shown. 208 F. Supp. 457. The case is here on direct appeal. 15 U. S. C. § 29. We noted probable jurisdiction. 374 U. S. 824.

We agree with the District Court that commercial banking is one relevant market[3] for determining the § 1 issue in the case. In Fayette County commercial banks are the only financial institutions authorized to receive demand deposits and to offer checking accounts. They are also the only financial institutions in the county that accept time deposits from partnerships and corporations and that make single-payment loans to individuals[4] and commercial and industrial loans to businesses. Moreover, commercial banks offer a wider variety of financial services than the other financial institutions, *e. g.*, deposit

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[2] That issue was put to rest by *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–355.

[3] In view of our disposition of the case we find it unnecessary to determine whether trust department services alone are another relevant market.

[4] Small loan companies make personal loans of $800 or less at interest rates higher than those charged by commercial banks. Since commercial banks carry a large volume of demand deposits, their real estate loans are generally of a shorter duration than those offered by savings and loan associations or insurance companies.

boxes, Christmas Clubs, correspondent bank facilities, collection services, and trust department services.

We also agree with the District Court that the consolidation should be judged in light of its effect on competition in Fayette County.[5] The record establishes that here, as in *United States* v. *Philadelphia National Bank, supra,* the "factor of inconvenience" does indeed localize banking competition "as effectively as high transportation costs in other industries." 374 U. S., at 358. Practically all of the business of the banks in Lexington originates in Fayette County. Only 4.8% of First National's demand deposit accounts and 4.5% of Security Trust's were held by depositors who did not maintain offices in Lexington. In dollar volume the percentage was 2.8 for each bank. Apart from large national companies, businesses in the area are restricted to the Fayette County banks for their working capital loans; and commercial banks outside Lexington do a negligible amount of business in the county. There is also a negligible amount of competition from corporate fiduciaries outside Fayette County.

We turn then to the facts relevant to the alleged restraint of trade under the Sherman Act.

Prior to the consolidation the relative size of First National and its five competitors was as follows:

	Assets	*Deposits*	*Loans*
First National	39.83%	40.06%	40.22%
Citizens Union	17.06	16.78	16.41
Bank of Commerce	12.99	13.32	14.46
Security Trust	12.87	11.88	13.98
Central Bank	9.14	9.66	8.85
Second National	8.10	8.30	6.09

[5] The Federal Deposit Insurance Corp. and the Federal Reserve Board used Fayette County as the geographical market, the latter saying that "since there are no concentrations of population in other

The bank established by the consolidation was larger than all the remaining banks combined:

	Assets	*Deposits*	*Loans*
First Security	52.70%	51.95%	54.20%
Citizens Union	17.06	16.78	16.41
Bank of Commerce	12.99	13.32	14.46
Central Bank	9.14	9.66	8.85
Second National	8.10	8.30	6.09

Prior to the consolidation, First National and Security Trust had been close competitors in the trust department business. Between them they held 94.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts:

	Trust Assets	*Trust Dept. Earnings*	*Number of Trust Accounts*
Security Trust	50.55%	46.91%	54.31%
First National	44.27	45.29	25.31
Citizens Union	3.41	4.21	16.01
Second National	1.33	.63	2.12
Bank of Commerce	.44	2.96	2.26

There was here no "predatory" purpose. But we think it clear that significant competition will be eliminated by the merger. There is testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years; that the "image" of "bigness" is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.

We think it clear that the elimination of signficant competition between First National and Security Trust constitutes an unreasonable restraint of trade in viola-

counties close enough to create competition with other banks, the competitive effects of the proposed consolidation would be confined to Lexington banks."

tion of § 1 of the Sherman Act. The case, we think, is governed by *Northern Securities Co.* v. *United States*, 193 U. S. 197, and its progeny. The Northern Pacific and the Great Northern operated parallel lines west of Chicago. A holding company acquired the controlling stock in each company. A violation of § 1 was adjudged without reference to or a determination of the extent to which the traffic of the combined roads was still subject to some competition. It was enough that the two roads competed, that their competition was not insubstantial, and that the combination put an end to it. *Id.*, at 326–328.

United States v. *Union Pacific R. Co.*, 226 U. S. 61, was in the same tradition. Acquisition by Union Pacific of a controlling stock interest in Southern Pacific was held to violate § 1 of the Sherman Act. As in the *Northern Securities* case the Court held the combination illegal because of the elimination of the *inter se* competition between the merging companies, without reference to the strength or weakness of whatever competition remained. The Court said:

> "It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control.

It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected." *Id.*, at 88–89.

United States v. *Reading Co.*, 253 U. S. 26, is the third of the series. There a holding company brought under common control two competing interstate carriers and two competing coal companies. That was held "without more" to be a violation of §§ 1 and 2 of the Sherman Act. *Id.*, at 59.

The fourth of the series is *United States* v. *Southern Pacific Co.*, 259 U. S. 214, in which the acquisition by Southern Pacific of stock of Central Pacific—a connecting link for transcontinental shipments by a competitor of Southern Pacific—was held to violate the Sherman Act. In reference to the earlier cases [6] the Court said:

> "These cases, collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade." *Id.*, at 230–231.

We need not go so far here as we went in *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225, where we said:

> ". . . the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected."

The four railroad cases at least stand for the proposition that where merging companies are major competitive

[6] Two of which had been decided after *Standard Oil Co.* v. *United States*, 221 U. S. 1, which announced "the rule of reason."

factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of § 1 of the Sherman Act. That standard was met in the present case in view of the fact that the two banks in question had such a large share of the relevant market.

It is said that *United States* v. *Columbia Steel Co.*, 334 U. S. 495, is counter to this view. There the United States Steel Corp. acquired the assets of Consolidated Steel Corp. Both made fabricated structural steel products, the former selling on a nation-wide basis, the latter in 11 States. The conclusion that the acquisition was lawful was reached after the Court observed, *inter alia*, that because of rate structures and the location of United States Steel's fabricating subsidiaries, the latter were unable to compete effectively in Consolidated's market. *Id.*, at 511–518, 529–530. The *Columbia Steel* case must be confined to its special facts. The Court said:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.*, at 527–528.

In the present case all those factors clearly point the other way, as we have seen. Where, as here, the

merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act. In view of our conclusion under § 1 of the Sherman Act, we do not reach the questions posed under § 2.

Reversed.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agree with the Court that the elimination of competition between the two banks in the circumstances here presented was a violation of § 1 of the Sherman Act. They would rest the reversal, however, solely on the conclusion that the factors relied on in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527–528, quoted by the Court, as applied to the facts of this case, clearly compel the reversal.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1963.

United States, Appellant, *v.* First National Bank and Trust Company of Lexington et al.	On Appeal From the United States District Court for the Eastern District of Kentucky.

[April 6, 1964.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

But for the Court's return to a discarded theory of antitrust law, this case would have little future importance. The decision last Term in *United States* v. *Philadelphia National Bank,* 374 U. S. 321, that § 7 of the Clayton Act, 15 U. S. C. § 18, is applicable to bank mergers surely marks the end of cases like this one, in which the Government relies solely on §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2. Since, however, this case, doomed to be a novelty in the reports, has become the vehicle for turning the clock back to antitrust law of days long past, I am constrained to do more than merely register my dissent.

I.

Stripped of embellishments, the Court's opinion amounts to an invocation of formulas of antitrust numerology and a presumption that in the antitrust field good things come usually, if not always, in small packages.[1] The "facts relevant to the alleged restraint of trade under the Sherman Act," *ante,* p. 3, on which the Court relies, are: (1) the size relative to their competitors of First National and Security Trust before the consolidation and of First Security after the consolidation; (2) the competi-

[1] Compare the dissenting opinion in *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 534.

tive position before the consolidation of First National and Security Trust in the more limited area of trust business;[2] and (3) "testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years . . . ," *ante*, p. 4.

The testimony to which the Court adverts was provided by competitors of First Security and was characterized by the district judge who heard it as seemingly "based merely upon surmise and . . . lacking in factual support." 208 F. Supp. 457, 460. Since the Court suggests no reason for regarding this evidentiary finding of the trial court as "clearly erroneous," it must be accepted here, *e. g., United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341–342, leaving as the factual basis for the Court's decision only the statistics unquestionably showing that First National and Security Trust were big and First Security is bigger. The embellishment which adorns these statistics is the proposition that "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of § 1 of the Sherman Act," *ante*, pp. 6–7.

The sole support for this proposition, which is defended by no independent reasoning whatever, is the four "railroad cases," a reiteration of which forms the bulk of the Court's opinion.[3] It is questionable whether those cases, three of which involved the combination of massive

[2] The reason for singling out this aspect of the banks' activities is unclear, since the Court does not determine even whether trust department services should be regarded as a relevant market. See *ante*, p. 2, note 3. In view of the majority's disposition of the case, I do not set out here my reasons for believing that the District Court's determination that the consolidation in question does not violate § 2 of the Sherman Act (monopoly) should be affirmed.

[3] *United States* v. *Yellow Cab Co.*, 332 U. S. 218; cited by the Court, *ante*, p. 6, is wholly irrelevant.

transportation systems[4] and the fourth a combination of "two great competing interstate carriers and . . . two great competing coal companies extensively engaged in interstate commerce"[5] have any relevance to the present factual situation. That question, however, need not be explored.

In *United States* v. *Columbia Steel Co.,* 334 U. S. 495, these same cases were cited by the Government for the same proposition urged here: that "control by one competitor over another violates the Sherman Act . . . ," *id.,* at 531. The Court relegated the cases to a footnote and stated that it would not "examine those cases to determine whether we would now approve either their language or their holdings." *Ibid.* The facts of the "railroad cases" were found to be "so dissimilar from that presented" that they could "furnish little guidance" in deciding the later case. *Ibid.* Beyond this explicit rejection of these cases as a basis for decision is their further rejection clearly implicit in the portion of the *Columbia Steel* opinion which the Court quotes, *ante,* p. 7.

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market." 334 U. S., at 527.

Quite obviously, if "bigness" alone provided a sufficient answer to the questions involved in a § 1 charge, it would

[4] *Northern Securities Co.* v. *United States,* 193 U. S. 197; *United States* v. *Union Pacific R. Co.,* 226 U. S. 61; *United States* v. *Southern Pacific Co.,* 259 U. S. 214.

[5] *United States* v. *Reading Co.,* 253 U. S. 26, 59.

be pointless to attend to the factors set out in *Columbia Steel* and reiterated here, in form approvingly but in fact without regard.

II.

If regard be had to the criteria enumerated in *Columbia Steel*, none of them except perhaps those which deal with "bigness" favor the Government here. Although for purposes of the Sherman Act, such statistics have little meaning in the absence of a context,[6] it may be admitted that the figures in this case of *dollar volume*[7] and the *percentage of business controlled* are large. So far as these figures have relevance under the *Columbia Steel* test, they perhaps speak against the appellee.

On the other hand, the *strength of the remaining competition* is attested by findings of fact in the District Court, not refuted or even mentioned in the Court's opinion:

> "As of December 31, 1960, there were in operation in Lexington, beside the First National Bank and

[6] The presumption which the Court laid down in *Philadelphia National Bank, supra,* at 363, that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is . . . inherently likely to lessen competition substantially . . . ." was concerned with the application of § 7 of the Clayton Act. Compare *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 612, a Sherman Act case in which the Court noted that "no magic inheres in numbers," and quoted with approval the statement in *Columbia Steel, supra,* at 528, that "the relative effect of percentage command of a market varies with the setting in which that factor is placed."

[7] As found by the District Court, in 1960, First National had "total assets of $65,069,000, total deposits of $58,673,000 and total net loans and discounts of $35,434,000." 208 F. Supp., at 459. Security Trust, in 1960, had "total assets of $21,033,000, total deposits of $17,402,000 and total net loans and discounts of $12,317,000. *Ibid.*

Trust Company and Security Trust Company, four other commercial banks, namely:

"Citizens Union National Bank and Trust Company, with total assets of $27,876,000, total deposits of $24,569,000 and total net loans and discounts of $14,457,000;

"Bank of Commerce, with total assets of $21,230,000, total deposits of $19,500,000 and total net loans and discounts of $12,738,000;

"Central Bank and Trust Company, with total assets of $14,930,000, with total deposits of $14,144,000, and with total net loans and discounts of $7,799,000;

"Second National Bank and Trust Company, with total assets of $13,240,000, total deposits of $12,157,000 and total net loans and discounts of $5,362,000.

. . . . .

"Before and since the consolidation herein referred to, all the banks in Fayette County have been operated successfully in the field of commercial banking and in competition with each other.

. . . . .

"In the trial of the case, other than the officials and employees of the defendant, First Security National Bank and Trust Company, numerous witnesses, most of whom were men of long experience in the field of banking, testified to the effect that, in their opinion, the consolidation of the two Lexington banks herein referred to would not lessen competition in the banking field in Fayette County and did not tend to create a monopoly in that field.

"According to their testimony, the fact that the merged bank had a large percentage of the trust business of the community did not and would not sub-

stantially restrain or lessen competition in the field of commercial banking." 208 F. Supp., at 459–460.[8]

The *motive* behind the consolidation also is indicated by the findings below, similarly unchallenged, that ". . . the consolidation herein referred to clearly appears to have been the result of a lawful program of expansion on the part of the merging banks rather than an invidious scheme to restrain competition or to secure monopoly in the local field of banking." 208 F. Supp., at 460. Any doubts on this score are removed by the explicit concession of government counsel at oral argument before this Court that there is no evidence at all in the record of an anticompetitive motive behind the consolidation.

There is nothing whatever in the findings below or in the opinion of this Court pertinent to the other criteria laid down in *Columbia Steel*—the probable development of the industry, consumer demands, and other market characteristics—which supports the Court's conclusion.[9]

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[8] The only contrary evidence, testimony of presidents of three of the four competing local banks who "expressed considerable fear that the consolidation would result in serious loss to the other banks and would be disastrous to some of them," 208 F. Supp., at 460, was discredited by the District Court. See *supra*, p. 2.

[9] With reference to the probable development of the industry, the Government turns to the past and notes that the number of local banks decreased from 10 to 7 between 1929 and 1938; but this statistic, more at home in a Clayton Act case, is of doubtful significance in the present context, particularly in view of the period during which the decrease occurred. The same may be said of the Government's reference to the testimony of the president of a competing bank that the consolidation from which his bank resulted was carried through (years before the First Security consolidation) principally to enable it "to better compete with the First National." In fact, in the three years since the First Security consolidation, there has been no further concentration.

In sum, the Court's analysis of the facts of this case ends where it begins; the conclusion that the consolidation violates the Sherman Act collapses into the agreed premise that First Security is "big."

III.

The truth is, of course, that this is, if anything, a Clayton Act case masquerading in the garb of the Sherman Act. One can hardly doubt that it comes to us under these false colors only because the decision last Term that bank mergers could be reached under the Clayton Act was indeed a surprise to the Government. See my dissenting opinion in *Philadelphia National Bank, supra,* at 373. No one has more sympathy for the Government in this respect than I. Nevertheless, having "at the outset elected to proceed not under the Clayton but the Sherman Act," *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 609, "the Government here must measure up to the criteria of the more stringent law," *id.,* at 610.

The pernicious effect of allowing the Government to change horses in midstream in fact if not quite in form [10] goes beyond this case and, in the field of banking, beyond even the revitalization of a properly moribund rule of antitrust law. In combination with the *Philadelphia National Bank* case, today's decision effectively precludes any possibility that the will of the Congress with respect to bank mergers will be carried out. The Congress has plainly indicated that it does not intend that mergers in the banking field be measured solely by the antitrust considerations which are applied in other industries. Characteristic of such indications, set out in detail in my dis-

[10] It is one thing to say, as the Court did in *Times-Picayune, supra,* at 609, that "the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve. . . ." It is quite another thing to treat them as interchangeable. See *id.,* at 609-610.

senting opinion in the *Philadelphia National Bank* case, *supra*, at 374–386, is the following excerpt from the Senate Report on the bill which became the Bank Merger Act of 1960, 12 U. S. C. (Supp. IV, 1963) § 1828 (c):

> "The committee wants to make crystal clear its intention that the various banking factors in any particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision." S. Rep. No. 196, 86th Cong., 1st Sess. 24.

Adherence to the principles enunciated in *Columbia Steel, supra*, would leave room for an accommodation within the framework of the antitrust laws of the special features of banking, recognized by Congress. It is difficult to see how features peculiar to banking or indeed any other features of a particular case which, in reason, should lead to a different result, can stand up against the bludgeon with which the Court now strikes at combinations which may well have no fault except "bigness."

I would affirm.

UNITED STATES OF AMERICA, Plaintiff,
v.
CROCKER-ANGLO NATIONAL BANK, Citizens National Bank, and Transamerica Corporation, Defendants.
Civ. A. No. 41808.

United States District Court
N.D. California, S.D.
Nov. 1, 1963.

Action by government to enjoin a proposed bank merger. The government moved for a preliminary injunction. A three-judge District Court held that evidence was insufficient to establish reasonable probability that government would succeed in establishing that the proposed merger would be violative of the Clayton Act or the Sherman Act.

Motion denied.

Robert F. Kennedy, Atty. Gen., Lyle L. Jones, Robert L. Wright, Antitrust Div., Dept. of Justice, San Francisco, Cal., for plaintiff.

Morrison, Foerster, Holloway, Clinton & Clark, Richard J. Archer, John P. Austin, Chickering & Gregory, Frederick M. Fisk, San Francisco, Cal., Cosgrove, Cramer, Rindge & Barnum, Samuel H. Rindge, Los Angeles, Cal., for defendants Crocker-Anglo Nat. Bank and Citizens Nat. Bank.

Orrick, Dahlquist, Herrington & Sutcliffe, Christopher M. Jenks, San Francisco, Cal., for defendant Transamerica Corp.

Before POPE, Circuit Judge, and SWEIGERT and ZIRPOLI, District Judges.

PER CURIAM.

On April 3, 1963, the defendant banks (Crocker-Anglo and Citizens) entered into an agreement for merger of the two banks under the charter of Crocker-Anglo, the resulting bank to be known as Crocker-Citizens National Bank. The merger was to become effective on the day specified by the Comptroller of the Currency in his certificate. Provision was made for termination of the agreement by either party if the merger did not become effective by December 31, 1963. On May 3, 1963, application was made to the Comptroller for his approval of the merger pursuant to Title 12 U.S.C. (1963 Ed.) §§ 1828(c) and 215a. Extensive hearings were held on this application on July 30, and 31, 1963, and on September 30, 1963, the Comptroller approved the merger subject to certain prescribed conditions, and fixed November 1, 1963, as its effective date.

Thereupon, on October 8, 1963, this action was brought by the United States seeking (1) an injunction prohibiting the proposed merger, (2) a preliminary injunction against the same, and (3), an adjudication that certain earlier mergers completed by Croker-Anglo were in violation of § 1 of the Sherman Act and § 7 of the Clayton Act, and (4) a judgment requiring defendants to take such action as is necessary and appropriate "to dissipate the effects" of the alleged unlawful activities and "to permit and restore competition in interstate and foreign commerce in commercial banking." A certificate was filed by the Attorney General under the Expediting Act, 32 Stat. 823, as amended (15 U.S.C. § 28), and the case was assigned to this court of three judges. The cause comes before us now on plaintiff's motion for a preliminary injunction.

The parties filed a stipulation, approved by the court, fixing the time for filing all briefs, affidavits, exhibits and other papers, and fixing the time for argument on the motion on October 21, 1963. Affidavits of both parties were filed, as stipulated by the parties that the motion was then submitted to us, after argument, upon the affidavits filed and certain additional exhibites which were offered by the plaintiff and received in evidence. Such is the record before this court at this time and upon which we have reached the conclusions which we now proceed to state.

We start with the premise that the governmental policy stated in the antitrust laws is an overriding one; that the need to preserve that policy obviates any further showing of irreparable damage; and that if there is a reasonable probability that the Government will prevail on the merits we ought to preserve the status quo by an injunction. As we view the matter, the primary question we must decide is whether we can find, upon the record now before us, that there is reasonable probability of ultimate success by the Government.

The locations of the operations of these two banks, as of April 5, 1963, are shown on the following map or chart.

COUNTY DISTRIBUTION (APRIL 5, 1963) OF:

124 BANKING OFFICES OF CROCKER-ANGLO NATIONAL BANK

78 BANKING OFFICES OF CITIZENS NATIONAL BANK

EXHIBIT 13

We consider first the question as to whether the record before us shows a possible or probable violation of § 7 of the Clayton Act. The operative words of that section prohibit, in respect to corporations engaged in commerce, the acquisition of the stock or assets of another corporation "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The case of United States v. Philadelphia Nat. Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915, settled the proposition that bank mergers are not excluded from § 7. Proceeding from the premise we pass rapidly over the question as to what is the relevant market here. The view we take of this case makes it unnecessary, so far as decision of this motion is concerned, to decide which "line of commerce" or which "section of the country" must be chosen as a basis for our inquiry as to the probable effects of this merger on competition. The parties are in disagreement as to the relevant market. The Government says that commercial banking is the appropriate line of commerce. United States v. Philadelphia Nat. Bank, supra, 374 U.S. at 356, 83 S.Ct. at p. 1737, 10 L.Ed.2d 915. It says that the entire state of California, the Los Angeles metropolitan area (Los Angeles and Orange Counties), and the San Francisco Bay Area (San Francisco, Alameda, Contra Costa, San Mateo and Marin Counties), are all sections of the country under § 7. Without discussing some countervailing arguments on these points which are made by the defendants, we assume, at this time, the correctness of the Government's contentions in these respects.

The primary question here is where do we find the competition which the merger acquisition may have the effect of lessening? Here we should have a look at the entire commercial banking picture in California. Both parties are agreed that since the middle 1930's concentration in commercial banking in California has been high. This, it would appear, has resulted in large part from the State's lack of restrictions on branch banking. Branch banking has flourished there. The following table, adapted from the Government's exhibits, shows the percentage of total deposits and of total loans and discounts of all the banks of the state held by the five largest banks.

Percentages of total IPC [individual, partnership, corporations] deposits and of total loans and discounts, the number of banking offices, and the counties in which such offices are located, 5 largest California banks, Dec. 28, 1962

Rank	Name of bank	IPC deposits (percent)	Loans and deposits (percent)	Banking offices	
				Number	Number of counties in which represented
1st	Bank of America, N.T. & S. A., San Francisco.	39.5	42.2	818	58
2d	Security First National, Los Angeles	13.9	11.2	278	13
3d	Wells Fargo Bank, San Francisco	10.1	10.3	148	23
4th	United California Bank Los Angeles	7.9	8.8	150	33
5th	Crocker-Anglo, San Francisco	7.2	7.2	122	29
	Total	78.6	79.7	1,516	

If this tabulation were carried forward it would disclose Citizens to be No. 8 in rank, its percentage of deposits to be 2.5, its percentage of loans and discounts to be 2.1, and its number of banking offices to be 78, located in 5 counties.

If the proposed merger had been completed on the date of that tabulation, Crocker-Citizens would be No. 4 in size, its percentage of deposits 9.7, its percentage of loans and discounts 9.3, and its banking offices 202, located in 34 counties. No material changes in these percentages or ranks are shown to have taken place through changes since the date of this tabulation.

It should be noted that the fact situation presented by the present record is quite different from that which was present in United States v. Philadelphia Nat. Bank, supra. In that case the merging banks were not only located in the same city and direct competitors of each other, but the result of the merger there was a significant concentration with the merged bank controlling at least 30% of the commercial banking business in the relevant area. The merger there would

result in an increase of more than 33% in concentration. (374 U.S. pp. 364–365, 83 S. Ct. pp. 1742, 1743, 10 L.Ed.2d 915). Here, in contrast, the proposed merged bank, Crocker-Citizens, would have but 9.7% of the deposits in the revelant area and 9.3% of loans and discounts. As the above figures indicate, the increase in Crocker-Anglo's percentage of deposits, now 7.2%, would be only 2.5% through the addition of the deposits of Citizens. In view of these statistics and in view of the size and extent of the other banks listed in the foregoing tabulation there can be no inherent likelihood that competition will be substantially lessened, for it is readily obvious that the merger will not produce a bank controlling an undue percentage share of the revelant market, and will not result in a significant increase in the concentration of banks in that market.

In making inquiry as to what competition is involved here, we start with the fact, not here questioned, that Crocker-Anglo and Citizens are located in rather widely separated areas. Apart from the situation existing in Ventura County, to which we will advert later, there is no solid evidence that Crocker-Anglo and Citizens compete against each other. In fact, necessary inference is all to the contrary; for we must recognize the fact, noticed by the Supreme Court in United States v. Philadelphia Nat. Bank, supra (374 U.S. p. 358, 83 S.Ct. p. 1738, 10 L.Ed.2d 915) that "[i]n banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance. * * * The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries." At the hearing before the Comptroller it was developed that the two banks had 140 depositors who had accounts in both banks. That is no proof of competition.[1] If a man living in Beverly Hills owned property in San Francisco, his having a deposit in both places would signify nothing as to these banks being in competition.

Ventura County furnishes a special and exceptional situation. As indicated on the chart first above set out, as of April 5, 1963, Citizens had a branch in that county, in a place called Thousand Oaks, population 2,934. As of the last day of December 1962, there were 30 banking offices in Ventura County of which Bank of America had 11, Security First National 9, United California 1, and First Western 1. This county has shown recent rapid growth.[2]

Shortly prior to 1963, Crocker-Anglo applied for permission to open two branches in Ventura County. This was granted and shortly prior to the hearing before the Comptroller, one of these branches was opened at Ventura (population 29,114). As of September 30, 1963, the Ventura branch of Crocker-Anglo had no deposits in the usual banking sense. (It carried Dealers Reserves as deposits.) Its loans were $325,000, a miniscule percentage of Crocker's total loans. At that time the Thousand Oaks branch of Citizens had deposits of $490,000, and loans of $359,000. These too are a miniscule percentage of Citizen's totals. Ventura and Thousand Oaks are 25 miles distant from each other. On January 2, 1963, Crocker-Anglo applied for permission to establish another branch in Ventura County, at Camarillo. The letter of application stated that branches at Ventura and Oxnard could not serve the entire county, but through the Camarillo branch "it is our desire to service the entire county." On February 12, 1963, this application was disapproved by the Comptroller.

Later on, in connection with our discussion of potential competition, we shall have occasion to discuss this move of Crocker-Anglo into Ventura County. But so far as a lessening of existing competition is concerned, in view of the size and extent of the market here relevant, and considering particularly the "section of the country" here involved, we cannot hold that any lessening of competition in Ventura County through the merger would be so substantial as to call for any injunction here. Such lessening would be *de minimis*. We do not understand Government counsel to claim otherwise.

The actual competition with which Crocker-Anglo and Citizens are each involved is competition with *other* banks in their respective areas. Nearest the place where this court sits are two of the banking offices described in the record: an office of the Hibernia Bank at Jones and McAllister Streets and the Jones and Market Street branch of Crocker-Anglo across the street. That both compete for the custom of the business houses in their vicinity is self-evident. The

[1] In his decision the Comptroller said: "These accounts are carried with both applying banks as a matter of customer's convenience, and they are not subject to competitive bidding between these banks."

[2] Total bank deposits had shown a 90.6% increase from 1956 to 1962. Population in 1962 is estimated to have increased 20% since the 1960 census.

question then is what will happen to such competition, which must be typical,[3] after the proposed merger? We perceive no evidence that it will be altered or lessened at all.

In simliar manner Citizens' 66 banking offices in Los Angeles County and 9 offices in Orange County, are a part of the 659 banking offices in Los Angeles County and 110 in Orange County. The presumably active competition that these figures suggest will, we are satisfied, not be altered in any substantial respect after the proposed merger. That such is true is apparent from another phenomenon present in the California banking situation. This is the very rapid increase in recent years in the entry of new banks into the California banking field,[4] and the rapid growth and success of such banks.[5]

We are forced to the conclusion that so far as presently existing competition in this field is concerned, there is no showing here that the proposed merger will have any competitive effect. It is not shown that its effect may be substantially, or at all, to lessen any existing competition.

The Government asserts, however, that the merger will tend to lessen *potential* competition between Crocker-Anglo and Citizens. The Government's showing seems to indicate that this point represents its entire case. Thus the statement concerning the economic effects of the merger made by the Government's principal economist expert is as follows: "Based on these documents" [the record before the Comptroller] "it is my opinion that this proposed merger will have a substantial adverse effect upon commercial banking competition in the State of California, because of its foreclosure of *potential* competition." (Emphasis added.) This statement is based upon the theory that if not permitted to merge Crocker-Anglo would enter the Los Angeles metropolitan area, and, in general, all of the area served by Citizens, by establishing *de novo* branches. So, it is said this merger would avoid the necessity of establishing such branches. Thus, it is contended, the merger will operate substantially to lessen that potential competition.

Whether there is such potential competition is a question of fact. To answer it is not easy, for it involves a forecast of probabilities. And upon this motion we are of course limited to the evidence and showing now before us.

The assertion that apart from the questioned merger Crocker-Anglo would have entered Citizens' territory through *de novo* creation of branch banks in that area is not something to be taken for granted. There must be proof to support an inference to that effect.

In some states it might be possible to infer that if a bank had been in the process of establishing branches over a wide section of the state that it would in due course extend its business throughout the state. But those who are familiar with California know that such cannot be said here for in many respects it is like two different states not closely related to each other.

The Tehachapi mountains, south of Bakersfield, form a natural barrier between north and south California. Between these two sections there are marked differences in types of business, methods of doing business, kinds of industries and occupations, and there are wide differences in the mores of the people and even in the manner in which they dress. It is natural that large businesses in northern California should stay there, and that those in southern California should do likewise. Certain chain stores and supermarkets found in one part of the state are absent from the other.

That this is markedly true in the banking business is evidenced by the past situation of Crocker-Anglo and Citizens. The same situation is true with respect to two of the five largest banks in the state, Wells Fargo and Security First National Bank. The former has a substantial number of banking offices in 22

[3] As of December 31, 1962, there were 129 banking offices in San Francisco, of which Bank of America had 55, Wells Fargo Bank 27, United California 6, Crocker-Anglo 13. First Western 4, Bank of California 3, and the Hibernia Bank 8. The remaining 10 include Pacific National Bank, Canadian Bank of Commerce, Golden Gate National Bank, Bank of Trade, San Francisco National Bank, and Hong Kong and Shanghai Bank. The last five, as we notice hereafter, are recently established.

[4] 17 national banks and 32 state banks, a total of 49, were chartered in the years 1960 to 1963 inclusive. And as of October 10, 1963, 21 additional new California bank applications (national and state) had been approved.

[5] "California Banks: Smaller Institutions Find Their Size an Asset, Not a Liability" Barron's, June 12, 1962, pp. 13, 20. Cited to us are the cases of San Francisco National Bank, opened May 31, 1962, with assets of less than 7 million on June 30, 1962, and by June 28, 1963 it had over 45 million total resources, and Golden Gate National Bank, opened June 1, 1961, with 2 branches and resources of 34.7 million on June 28, 1963. Both banks are located in the heart of the financial district in San Francisco. Other smaller banks referred to are Pacific National and Hibernia Bank, both of San Francisco, the former showing 200% increase in deposits from 1953 to 1962, and the latter 30% *increase in the* same period. These are typical of a state-wide trend.

counties in northern California (148 as of December 31, 1962), and the latter, as of the same date, had 278 banking offices in southern California. (Security First National offices cover a somewhat larger area than Citizens as it includes San Diego and Imperial counties on the south, and Fresno, Kings and Tulare counties near the center of the state.) With respect to Wells Fargo and Security First National it is apparent that each has chosen to stay in its own section.

The question then arises what evidence is there now before us that apart from the proposed merger Crocker-Anglo would within any foreseeable period of time become a competitor of Citizens in the latter's area of southern California.

We think it is plain that before a merger may be condemned merely because its effect may be to lessen *potential* competition it must be ascertained that the potential competition is a reality, that is to say, that there is a reasonable probability of such potential competition.

The legislative history of the 1950 amendment of § 7 of the Clayton Act makes it plain that with respect to the question of whether the effect of a merger "may be substantially to lessen competition" the proof must be that there was a reasonable probability that the merger would have the prescribed effect. As stated in the Committee Reports,[6] "[t]he use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act."

Of course, if the effect is to be judged only by "reasonable probability" then *a fortiori* the existence of a potential competition must be judged according to the reasonable probability of the same. To say that it would be possible for Crocker-Anglo to move by *de novo* branching into the area of Citizens is not enough. The question is, has there been disclosed a reasonable probability that such would be the case? In short, our function is not to speculate upon the basis of mere possibility.[7]

The Government asserts that the past history of Crocker-Anglo points to the probability of the suggested potential competition. Crocker-Anglo is the result of a 1956 consolidation of Crocker First National Bank of San Francisco and Anglo-California National Bank. At that time Crocker First National had two branch offices in Oakland and San Mateo and Anglo-California National Bank had 46 banking offices in San Francisco and the surrounding area. Prior to that time Crocker First National had specialized in wholesale banking. From that time on Crocker-Anglo has followed a policy of expansion. Its 49 offices as of the date of that merger have grown to 129. Some of these later acquired branch banks were acquired by merger and a much larger number by *de novo* branching. It is to be noted that the expansion program thus manifested has been,

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[6] S.Rep. 1775. See U.S. Code Cong.Serv. 81st Cong., 2nd Sess. 1950, Vol. 2, p. 4298.

[7] United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533, dealt with a complaint charging violation of §§ 1 and 2 of the Sherman Act. As it was decided prior to the 1950 amendment of § 7 of the Clayton Act, which was perhaps designed to alter some of the results of Columbia Steel, see United States v. Philadelphia Nat. Bank, supra, 374 U.S. at p. 340, 83 S.Ct. at p. 1729, 10 L.Ed.2d 915, we would not undertake to cite it generally as an authority for our decision here. It did, however, discuss the question of what proof would be required to establish a claim of substantial potential competition. At that time, at any rate, the Supreme Court was apparently of the view that a claim of potential competition would have to be proven by showing something more than a mere possibility of future competition and under the circumstances of that case, the Court declined to speculate on the basis of possibility. Such may well be still good law as to the *quality of evidence* required to prove the probability of potential competition. The Court there said: "The United States makes the point that the acquisition of Consolidated would preclude and restrain substantial potential competition in the production and sale of other steel products than fabricated structural steel and pipe. Force is added to this contention by the fact, adverted to above at pages 500 and 512 [of 334 U.S., at pages 1110 and 1116 of 68 S.Ct., 92 L. Ed. 1533], that United States steel does no plate fabrication while Consolidated does. By plate fabrication Consolidated produces many articles not now produced by United States Steel. We mention, as examples, boilers, gas tanks, smoke stacks, storage tanks and barges. Attention is also called to the war activities of Consolidated in steel shipbuilding as indicative of its potentialities as a competitor. We have noted, [334 U.S. 498] pp. 500–501, [68 S.Ct. 1109, pp. 1110, 1111, 92 L.Ed. 1533] supra, that this construction was under government direction and financing. We agree that any acquisition of fabricating equipment eliminates some potential competition from anyone who might own or acquire such facilities. We agree, too, with the government's position that potential competition from producers of presently noncompetitive articles as well as the possibility that acquired facilities may be used in the future for the production of new articles in competition with others may be taken into consideration in weighing the effect of any acquisition of assets on restraint of trade.

"The government's argument, however, takes us into highly speculative situations. * * * Looking at the situation here presented, we are unwilling to hold that possibilities of interference with future competition are serious enough to justify us in declaring that this contract will bring about unlawful restraint." (334 U.S. pp. 528–529, 88 S.Ct. pp. 1124, 1125, 92 L.Ed. 1533.)

with the exception of the move into Ventura County, previously referred to, and branches in Santa Barbara County, hereafter mentioned, confined generally to the counties and areas north of the Tehachapis.

The Government claims that the record of this branching discloses a southward trend and that the history of this process discloses a steady movement which will lead into the Los Angeles area. This is not so.

The attempted showing made by the Government in support of its contention (Schedule III attached to Duriam affidavit) fails completely. It discloses a misunderstanding of the areas traditionally constituting northern and southern California. For instance, this is a list headed "Offices of Crocker-Anglio opened since *January 1, 1958 South of San Francisco.* This includes branches in Daly City, Redwood City, San Jose, Santa Clara, and Sunnyvale, all a part of the San Francisco metropolitan area. The remaining branches listed in this schedule, (with the exception of Ventura and Santa Barbara Counties, to which we shortly allude) are all north of the Tehachapis.

The Government places particular emphasis upon the establishment of branches in Santa Barbara County. It says that Santa Barbara is well toward the south of the state and that this evidences an inevitable movement into Los Angeles. We think that the establishment of branches in Santa Barbara County is to be explained by its special economic condition and through the peculiar opportunities there for banks with trust departments. There is a special reason, peculiar to Santa Barbara County, for branching there. Crocker-Anglo of course was aware of its "reputation for living elegantly and its money from the multimillionaires who made the area—especially adjacent Montecito—their playground." This "socially impeccable retirement enclave" with many "elderly widows who travel a great deal," is an unusually rich source of business for trust departments of banks.[8] Branching into Santa Barbara County presents something entirely different from a movement into Los Angeles County.

We have previously indicated the special circumstances relating to Ventura County. We cannot find that Crocker-Angelo's entry into those counties is evidence that absent the merger here involved Crocker-Anglo would probably move into such areas as Los Angeles and Orange County where Citizens principally operates.

Counsel for the Government has offered in evidence certain testimony given by the President of the Crocker-Anglo at the hearing before the Comptroller of the Currency on July 30, 1963. The offer is on the theory that this testimony would constitute an admission with respect to the question of probability of potential competition. The portions of the testimony to which attention is called are as follows: "The Comptroller: Are you prepared to state why, in your opinion, or so far as you are aware, with your knowledge of the policies of the Crocker Bank, why it has not undertaken in the past to establish itself in Southern California, particularly in the Los Angeles area?

"Mr. Solomon: We have long entertained the idea. The circumstances never seemed to be completely appropriate until the origination of our negotiations with the Citizens Bank. There is nothing novel or new in our desire and intention to move south. There have been previous attempts to move in that direction.

"The Comptroller: Apart from the question of merger, as here proposed, can you tell us why, in your opinion, the bank did not seek to employ the de novo branching route into the southern part of California?

"Mr. Solomon: I cover that later in my statement in some detail."[9]

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[8] The quoted language is from an article on Santa Barbara in the New York Times Western Edition for October 25, 1963.

[9] In the statement here referred to the witness stated: "Crocker-Anglo, however, could not enter the Los Angeles area de novo on a sufficient scale to broaden its financial base or to enable it to compete with the statewide banks. The practical problems of obtaining qualified personnel and acceptable locations, not to mention cost, are insurmountable." He discussed at considerable length the reasons why in his view to move into that area on a de novo basis and to furnish effective banking service and competition would be an insuperable task. A single or only a few branch offices could not handle the needs of customers in that extended area where business establishments are spread over a wide geographical area; a branch in downtown Los Angeles would be available to only a small portion of businesses; it would require over seven years to train the necessary branch management personnel for a system comparable to that of Citizens, and require longer for the next top level administrative personnel which would have to be supplied because San Francisco and Los Angeles are approximately 400 miles apart, and top management could not operate from San Francisco. He estimated the cost of physical properties, of training administrative personnel, together with the loss expected during the first 14½ months would aggregate $29,721,000. The 14½ months is the expected period of loss in establishing a new branch in a contiguous area. He estimated the loss in this distant metropolitan area would extend for five years.

Wholly apart from this witness's testimony as to the impossibility of moving into Citizens' area the present record leaves us without any evidence that that move would be made absent the merger.

It is true that Mr. Solomon testified that they had long entertained the idea of establishing Crocker-Anglo in southern California and obviously Crocker-Anglo seized the opportunity to make the merger considering it a desirable move. Under the arrangement with Citizens it has agreed in effect to transfer to Citizens' stockholders as a part of the arrangement a bonus the equivalent of $12,000,000; but if, as stated, Crocker-Anglo has long entertained the idea of moving into that area and during that time has made no move to establish *de novo* branches there, this in itself tends to negative the claim of a probable potential competition, in the manner asserted by the Government.[10] It confirms the existence of serious obstacles to establishment of such branches, and the unlikelihood that Crocker-Anglo would, in the foreseeable future, attempt to establish such branches.

Challenging the statement of Crocker-Anglo's president that in order to be competitive in the Los Angeles area Crocker-Anglo, if it adopted the de novo branch route, would have to establish substantially the same number of branches as those operated by Citizens, counsel for the Government asserts that becoming a competitor of Citizens in Los Angeles "could have been accomplished as the Bank of California accomplished it this year by going in and opening *an* office, a branch office, in downtown Los Angeles." (Emphasis added.) Anyone acquainted with Los Angeles and the manner in which its business areas are sprawled across the map, would have to agree that Crocker-Anglo cannot supply any substantial competition for Citizens by establishing a branch office in downtown Los Angeles. As was pointed out at the hearing, the Bank of California is a very special institution having the unique privilege of maintaining branches in several states, at Seattle, Portland, San Francisco, and Los Angeles. One branch in Los Angeles for that bank may well be worthwhile to permit it to advertise its interstate services and representation in all large metropolitan centers up and down the Pacific coast. But for the purpose of furnishing a substantial competition in such a metropolitan area by *de novo* branching it is obvious that multiple branches would be required to take care of the very considerable business communities in Los Angeles County such as Beverly Hills, Hollywood, Westwood, Burbank, Inglewood, Whittier, Glendora, Torrence, and the like, not to mention numerous centers in Orange and Riverside Counties.

We are not convinced that one such branch bank in downtown Los Angeles could represent the sort of substantial potential competition which is urged upon us here.[11]

In this case there is another special circumstance which makes *proof* of probable prospective competition by Crocker-Anglo through establishment of *de novo* branches in the Los Angeles area well-nigh impossible. Unlike a grocery chain or a hardware merchant or a steel manufacturer who can establish new outlets or plants where he wishes, Crocker-Anglo cannot establish a branch bank anywhere without approval of bank supervisory authorities. Whether the Comptroller would permit the establishment of sufficient branching in this area is so uncertain as further to throw this whole question into the field of speculation. At the time of his decision upon the application for merger the Comptroller obviously considered the five southern counties occupied by Citizens as already overcrowded with banks.[12]

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[10] It is interesting that the Government's economist affiant previously mentioned asserts in his affidavit in support of his statement as to potential competition: "Crocker-Anglo is evidently on the point of moving into the Los Angeles area"; but in the same affidavit he also states that "It is clear that Citizens and Crocker-Anglo neither faced squarely, nor made a serious effort to appraise the costs and benefits in becoming more, rather than less competitive with each other and with other Los Angeles and San Francisco banks." This would seem to amount to a statement that Crocker-Anglo has given no thought to *de novo* branching in the Los Angeles area.

[11] The decision of the Comptroller which of course is in no way binding upon us, contains the following statement: "A single branch office in Los Angeles obviously could not be a comparable competitive substitute for a substantial number of branches in the southern counties. Such a branch, while necessitating a very heavy capital outlay, would not be able to serve the Los Angeles area in a degree comparable with Citizens' ability to serve it. The few benefits such a single branch would produce for Crocker-Anglo would not offset the costs involved."

[12] Said the Comptroller in his decision: "In the light of the existing branch coverage in these five southern counties today, it would seriously over-bank this area if the Bank Supervisory Authorities were to permit the establishment of any such number of additional *de novo* branches. Prime branch locations, or even locations that may be deemed satisfactory, are not now available in anywhere near such figures. In fact, this Office has been finding it necessary to review applications for *de novo* branches in this area most critically in order to avoid the evils of destructive competition too many branch offices would produce."

We are compelled to conclude on this record that the evidence with respect to the alleged potential competition is wholly insufficient to permit us to make a finding of any lessening of competition in consequence of the merger here in question.

We hold that there is now nothing before us which would permit us to find that there was even a prima facie case that could be made or even any suggestion of doubt as to there having been a violation of § 7 of the Clayton Act. In that situation we must conclude that there is no showing here to support the issuance of a temporary injunction to preserve the status quo based upon a claim of violation of § 7.

Since the merger does not violate the Clayton Act, the possibility that it might be held to violate the more stringent standards of the Sherman Act seems most unlikely. See Times-Picayune v. United States, 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277; Tampa Electric Co. v. Nashville Co., 365 U.S. 320, 335, 81 S. Ct. 623, 5 L. Ed. 2d 580. We have indicated at great length the reasons for our finding that there is no existing or prospective competition that could possibly be lessened through this merger. For a like reason we hold that we do not have here any basis for a prima facie case showing a contract, combination or conspiracy in restraint of trade. And in light of the statistics previously given, it cannot be claimed that this merger would in any way tend to create a monopoly.

The Government has made an argument which we have some difficulty in understanding to the effect that we ought to hold this merger to be a violation of the Sherman Act because the results of the merger will be as harmful and as restrictive of competition as would be the results of a certain hypothetical agreement between Citizens and Crocker-Anglo. Let us suppose, proceeds this argument, that Crocker-Anglo and Citizens had entered into an agreement to the effect that neither would enter into the territory of the other for the purpose of establishing branch banks. Since such an agreement to divide up the territory would constitute a per se violation of the Sherman Act, it is argued that a similar conclusion ought to be drawn with respect to this merger.

We think this is a complete *non sequitur*. What is about to happen here is not a division of territory but rather the creation of a consolidation whereby a single successor bank will operate in both areas.[13] We cannot find any violation of the Sherman Act per se or otherwise in the record before us.

It is plain that behind the desire of defendant banks to accomplish the proposed merger is the anticipated opportunity to procure new business. As of now there are three banks in California which furnish to some degree banking services in both northern and southern California. These are Bank of America with branches in every county in the state, United California Bank with branches in all southern California counties, and in most important northern California counties, and First Western Bank and Trust Co. with branches in a more limited number of counties both north and south. There are customers of California banks which have operations in both northern and southern parts of the state. Some of these desire to do their banking with one banking institution. The record shows with some detail why such customers desire to obtain that kind of banking service. Heretofore Crocker-Anglo and Citizens have been unable to supply that service; their hope to participate in it in the future is the primary reason for the proposed merger. If the merger is completed the net result will be that the statewide banks, so called—Bank of America, United California Bank and First Western Bank—will have competition in that field from Crocker-Citizens. The present oligopoly resulting from the operations of the three statewide banks mentioned would thus be somewhat thinned by the entry of Crocker-Citizens into this field.[14]

The view which we take of this action is epitomized in the following statement in *Transamerica Corp.* v. *Board of Governors*, 3 cir., 206 F. 2d 163, 169: "We agree that this quantitative analysis discloses a tremendous concentration

[13] Counsel could just as well argue that if Citizens and Crocker-Anglo continued in the future as they have in the past to operate each in its own respective territory without any agreement whatever to remain there, then since this would result in carrying on of banking in the same manner as would have been carried on under an agreement to divide the territory, this nonaction by the two banks could and ought to be treated as a violation of the Sherman Act, a manifest absurdity.

[14] If it were possible to point to a lessening of competition as a result of this merger, the fact of an increase of competition with existing larger institutions would not be a defense. See *United States* v. *Philadelphia Nat. Bank supra*, 374 U.S. at p. 370, 83 S. Ct. at p. 1745, 10 L. Ed. 2d 915. As we have indicated, such is not the situation here. An affidavit by an attorney for the Department of Justice, filed here, concedes that it is the position of the Department that "California needs more statewide commercial banks."

of banking capital, and thereby of economic power, in the hands of the Transamerica group which may be unwise and against sound public policy. It may well be in the public interest to curb the growth of this banking colossus by appropriate legislative or administrative action. This, however, is not for us to decide. Our only question is whether the theory upon which the Board based its decision meets the legal tests which are required under section 7 of the Clayton Act * * *."

Since we are of the opinion that on this hearing no prima facie case has been made, we must deny the motion for a preliminary injunction.

The Government has suggested that we might tentatively issue an injunction here and continue to consider the matter until December 31 which is the final upset date for the merger. It is also suggested that since the Government has served interrogatories in this case, which have not yet been answered, we ought to delay our decision for some further period. It is the view of this court that we should not delay a decision. The matter has been submitted upon the stipulation made by all the parties; and at the hearing it was agreed that the court had a complete record composed of affidavits filed and other exhibits offered at the hearing. The court would not be warranted in issuing an injunction holding up this matter merely to permit the Government to await answers to interrogatories in the hope that something further may turn up.

Of course, on final hearing on the merits, other proof may be forthcoming, through these or other discovery proceedings, or otherwise.

So far as the presently proposed merger is concerned, should the Govenment make a case on final hearing, we would be confronted with a problem of divestiture. We appreciate the difficulties presented is such a case. But those alone do not warrant a preliminary injunction. And, in any event, on final hearing we will be confronted with a problem of divestiture, since the Government asks us to undo other mergers, including that between Crocker National and Anglo-California in 1956.

Transamerica Corp. has been made a defendant here, evidently because it is alleged that it has working control of Citizens. Since we have denied the motion for preliminary injunction against the merger of the banks we find no occasion at this time to discuss the rights or liabilities of Transamerica.

Findings in accord with this opinion will be filed and thereupon an order denying the motion for the preliminary injunction will be entered.

UNITED STATES v. THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY

In the United States District Court of the United States for the Middle District of Tennessee, Nashville Division. Civil Action No. 3849. Dated August 18, 1964.

Case No. 1819 in the Antitrust Division of the Department of Justice.

MEMORANDUM

This action was instituted by the plaintiff, United States of America, against the Third National Bank in Nashville and Nashville Bank and Trust Company to enjoin their merger pursuant to an agreement entered into on March 12, 1964. The complaint charges violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act. On August 10, 1964, a motion was filed by the plaintiff for a preliminary injunction pursuant to Section 15 of the Clayton Act and Section 4 of the Sherman Act. By agreement the proposed merger was not consummated by the defendants pending a hearing on the motion for preliminary injunction which was set for August 14, 1964, and pending the ruling of the Court upon the plaintiff's motion.

A full hearing was held on August 14 and 15, 1964,,and the attorneys for the respective parties were allowed to make extensive and elaborate arguments in support of their contentions. Evidentiary material relied upon by the parties has been presented in the form of affidavits, verified pleadings, exhibits, and the testimony in open court of the President of the Third National Pank.

It is well settled that in order to obtain a preliminary injunction the Government is required to establish a reasonable probability that it will ultimately prevail on the merits and that a denial of the injunction will result in a substantial injury to the general public for which there is no adequate means of redress. In this case the first question to be determined is the effect of the proposed merger upon competition in the field of commercial banking in the Nashville Metropolitan area.

While the evidence is in some conflict as it has been presented to the Court on the question of the effect of the proposed merger on competition, the Court is persuaded that the Government has failed to carry the burden resting upon it to obtain the extraordinary relief of a preliminary injunction. It is true that the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Department of Justice, each reported to the Comptroller of the Currency an opinion adverse to the merger on the ground that it would have an adverse effect on competition. However, it is to be observed that these reports were based primarily upon cold statistics without consideration of other factors having, in the Court's opinion, a direct bearing upon Nashville Trust's posture as a competitive factor in commercial banking in this area. The Comptroller of the Currency, who is assigned by law the duty of approving or disapproving bank mergers, and who is required to consider among other factors the effect the proposed merger will have upon competition, rendered a detailed and comprehensive opinion or memorandum in which he carefully explained the reasons for his ultimate conclusions that the merger will promote the public interest and will not substantially or significantly lessen competition. Pertinent portions of his statement are as follows:

"The merging bank, chartered in 1889 as a trust company, passed through a merger and reorganization and emerged in 1956 with its present title. In 1959 the bank opened its first and only branch. Prior to January 1964, it was controlled by a wholesale grocery firm, which sold its stock in the merging bank to a syndicate controlled by insurance interests. The new owners soon found that injection of a substantial amount of capital and effort would be required both to make the bank a competitor in the Nashville area and a profitable undertaking for the owners. Having no desire to divert their attention from the insurance field and being unwilling to put large sums into the bank, these interests gave consideration to the merger route for a solution. They were prompted in part by the fact that, during the period since assuming control, deposits in the merging bank declined from $45.4 million to $39.6 million, despite an increase of $1.1 million in public fund deposits. By contrast, deposits in the other three banks in the city rose sharply after 1960 and continued to rise. Many of the merging bank's customers, who previously felt obligated to maintain deposits in the bank because of their business connections with the previous owners, the wholesale grocery firm, indicated that they were then free to move their accounts to larger banks. Additionally, the change of ownership resulted in a substantial loss of accounts in the bank's trust department.

"One of the most determinative factors in the consideration of this merger is the problem of management succession. This Office has stated time and again that a bank is only as good as its management. In the case of the merging bank, the president is ill and anxious to retire. Further, there is no provision for succession. The dearth of young management personnel and the unlikelihood of attracting new employees to the merging bank is due to the below average salary scale and the lack of an adequate pension plan. The present owners of the bank show no intention of instituting costly reforms to attract employees capable of making the bank a vigorous competitor, responsive to the needs of the community. As a result, the merging bank is presently noncompetitive. Only through merger with the charter bank, where the resulting bank will be a National Bank, will this Office have an opportunity to assist this noncompetive state-chartered institution as well as the people of the Nashville community. We would, indeed, be derelict in our responsibilities to protect the public interest in banking were we to impede effective management from assuming the responsibilities of a declining and leaderless bank.

"We turn now to the future earnings prospects of the applicant banks, another criterion established by law in the consideration of bank mergers. The future earnings prospects of the merging bank, in its present condition, are very gloomy. The recent substantial decline in deposits and the phlegmatic and incapacitated management bode ill for future earnings of the bank unless remedial steps are taken. If merger is the remedy, however, as we are convinced it is, the future earnings prospects of the resulting bank are excellent because of the dynamic management, existing branching system and operating efficiency of the charter bank.

"Only minimal competition exists between the two applicant banks due to difference in size and to diversity of market interests. As stated above, the charter bank serves numerous correspondent banks throughout its region. These correspondent banks' deposits account for 18.7% of the charter bank's deposits, as compared to the merging bank's correspondent deposits which amount to only

1.2% of the merging bank's deposits. Commercial loans make up 40% of the charter bank's total loans, but only 25.7% of the merging bank's total loans. Further contrast can be seen in the fact that, while real estate loans account for only 0.8% of the charter bank's loans, such loans constitute 34% of the merging bank's loans.

"While the cold statistics presented by the application may indicate at first blush that some competition now exists between the applicants and that it will be eliminated by this merger, closer analysis of the complete picture dispels this hasty conclusion. A bank's competitive force in its community depends greatly upon the attitude of its management and board of directors. To assess accurately competition between two banks, an effort must be made to weigh the aggressiveness, the capability, the experience and the desire of the management of each to compete. When, as in this case, we find that the management of the merging bank is more interested in insurance than in banking, has no desire to maintain the bank's relative standing in the banking community, and has made no effort to improve its internal operating procedures nor elevate the morale of its personnel through better salaries and an improved pension plan, we cannot realistically view it as a competitive bank. When a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of a merger.

"The hallmark of modern banking is branch competition. The inability of the merging bank to effectively serve the public is graphically illustrated in its failure to develop a modern branching system despite the fact that it was founded in 1889. With the three largest banks in Nashville having 20, 15, and 20 offices, respectively, it is manifest that Nashville Bank and Trust Company, with a single branch, cannot compete in the important area of branching.

"The competition for funds in the Nashville community is not confined to commercial banks. It must be noted that savings and loan associations are particularly strong competitors. While competition is most desirable and indeed a basic tenet of the American economic system, the advantages to savings and loan associations arising from higher permissible interest and dividend rates, as well as tax privileges not available to commercial banks, make a difficult competitive situation for the banks. This fact is reflected in the 325% increase in savings and loan share accounts in the Nashville community since 1953 and the opening of three new savings and loan association branches during the past year. There is certainly a need for a stronger institution to compete for funds in such a market.

"There is no tendency toward monopoly in the Nashville area or community. The charter bank has never been involved in a merger since its founding in 1927; its rapid growth has been internal. The number of Nashville banks has not declined during the past 30 years. Indeed, a relatively new bank, the Capital City Bank, which was chartered in 1960, now has almost $7.5 million in resources and two branches. There is hardly a monopoly when a new bank can enter the market and prosper so remarkably in such a short time.

"One of the best qualified authorities on banking in Tennessee has recognized the fact that the merger will be a salutary development. In a letter of April 25, 1964, Mr. M. A. Bryan, Superintendent of Banks, State of Tennessee, said of the proposed merger:

"The competitive factor in my opinion will not be lessened by the merger. This assumption is based on the evident competition which now and will exist between existing First American National Bank, largest Nashville bank, The Commerce Union Bank, in third position, and Third National Bank, second in size, the surviving institution of the merger between themselves and Nashville Bank and Trust Company which holds a minor position in the field insofar as competition is concerned.

"Consummation of the proposed merger will improve the charter bank's ability to serve the convenience and needs of the Nashville public. It will be better able to meet the credit needs of its larger customers throughout the Nashville wholesale trade area. Automation will improve the operating efficiency for the benefit of the merging bank's customers. Increased salaries and other incentives such as the charter bank's pension plan will improve the morale of the merging bank's personnel. The more numerous banking services offered through the resulting bank's extensive branch system will better serve the needs of the merging bank's customers. Further, the assets of the merging bank will be pooled with those of the charter bank to be used more efficiently in promoting the economic well-being of the people of the Nashville community, the wholesale trade area which it serves, and the mid-South region of which it is the center."

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timony of the President of the Third National Bank at the he... testimony pport to the Comptroller's findings, and although his testimony ly interested testimony, it is entitled to considerable weight because of s for his conclusions. He commented particularly upon the fact that the le Bank and Trust Company did not have and has not had for a con- le length of time managerial capability in depth; that its salary scale has elow the average for the area and was insufficient to attract qualified nel; that it did not have an adequate pension plan for its employees; that ked automation, an almost essential feature for a modern, progressive bank; its President, who had been primarily responsible for its measure of success ecent years, was almost out of the picture because of ill health; and that no vision had been made for his successor. It was his opinion that new personnel a bank should be recruited primarily from the community in order to obtain rsons having local contacts and knowledge of local conditions. He felt that the ashville Bank and Trust Company was not in position to do this in competition ith other banks paying better salaries and offering better benefits to its employees. nother factor of importance which he commented upon in his testimony was the act that the Trust Company had only one branch bank with the result that it was not in position to offer its services except in a very restricted area in down-town Nashville. To place it in position to be truly competitive it was his opinion that a large expenditure of money would be required to provide for automation, improved facilities, larger salaries, branches, etc.

The affidavit of Mr. Hackworth, President of the Nashville Bank and Trust Company, is equally factual and convincing that the Trust Company, although it admittedly has substantial assets, deposits, and loans, is not, vis-a-vis the Third National, a major or even a substantial competitive force. It is pointed out that the bank has lost the benefit of the active influence and interest of one of its principal owners and board members over a period of many years who has doubtless attracted a large share of its business.

There is no basis for concluding on the present record that these adverse conditions have been contributed to or brought about by the Weaver group which bought the controlling interest in the Nashville Bank and Trust Company in January 1964. It can be inferred, of course, that the Weaver group did not see fit to spend the large sums of money which would have been required to improve the competitive position of the bank and that as an alternative they entered into the agreement above referred to to merge with the Third National. But this is a far cry from saying that the conditions were caused by them. In essential part they antedated the change of ownership.

The decision of the Supreme Court in *United States* v. *Philadelphia National Bank, et al.* [1963 TRADE CASES ¶70,812], 374 U.S. 321, decided that the Clayton Act is applicable to bank mergers. The decision of the Supreme Court in *United States* v. *First National Bank and Trust Company of Lexington, et al.* [1964 TRADE CASES ¶71,072], 12 L. Ed. 2d 1, reaffirms the applicability of the Sherman Anti-Trust Act to bank mergers. These are the principal authorities relied upon by the government to support its application for a preliminary injunction in the present case.

However, the Court does not find that these cases are controlling here. In the *Philadelphia* case, the second and fourth largest banks merged, forming a bank which became the largest in the market area, whereas in this case the new banking institution will not occupy first place, although admittedly it will be in a stronger competitive position. In *Philadelphia* neither bank had anti-trust clean hands—the Philadelphia National having acquired nine formerly independent banks and the Girard six; an acquisition extending over a long period of time into the recen past. In the present case, there is no such history. In *Philadelphia*, the tw banks were of comparable size, were admittedly major competitors in the mark and neither bank had any major problems of management or personnel; wher in the instant case, the Trust Company's share of the market as compared w the other three leading banking institutions is not on a comparable basis. I met with a deteriorating managerial and personnel situation. Another signifi factor is that in the *Philadelphia* case the merger caused a market share increa approximately 33% on the part of the two largest banks; whereas in the pr case, the increase is only approximately six percent.

In *United States* v. *First National Bank and Trust Company of Lexingto* TRADE CASES ¶71,072], the Supreme Court held that the proposed consol was unlawful under Section 1 of the Sherman Act based upon a variety of not controlling here, including the presence of a purpose to monopoliz ... satisfy business requirements, the probable development of

consumer demands, etc. One differentiating factor between the *Lexington Bank* and the instant case is that the bank in Lexington, after the merger had been consummated, was three times as large as its nearest competitor and larger than all other banks in the community combined. Finding that neither the *Philadelphia* nor *Lexington* cases is in point or controlling, the Court is of the opinion that it cannot be said on the basis of the present record that there is a reasonable probability that the Government will prevail in this litigation. It may do so after the facts are more fully developed. Or it may be that after a trial this Court will have a different opinion, or that if it does not have a different opinion, the Appellate Courts may take a different view. If Government success in the litigation should be the eventual outcome, it would be necessary to order a divestiture. This device, much discussed at the hearing, is concededly fraught with many problems and difficulties. Nevertheless, it is not uncommon as a remedial procedure in antitrust litigation, and the Court is not prepared to say that a divestiture, if it should become necessary in this case, could not be successfully effected. The defendants are aware of the risks involved. They know that the final result in this case cannot be predicted with absolute certainty. They have indicated their willingness to assume the risks, aware that they may in the end have to undo what they have done. Such a willingness strengthens the belief that a substantial restoration of the status quo could be fairly brought about by divestiture if the merger should finally receive judicial condemnation.

The Court has been presented with no facts to indicate any bad faith on the part of the parties concerned with the merger and no facts from which to conclude that they have entered into an unlawful combination or agreement. On the contrary, the natural and reasonable inference is that a merger presented itself as a logical alternative to the expenditure of large sums of money to improve the facilities and services of the Trust Company and to place it in a position to compete successfully on a market which the evidence shows to be one of the most fiercely competitive in the United States.

The motion for preliminary injunction is therefore denied. Order accordingly.

UNITED STATES of America, Plaintiff

v.

THIRD NATIONAL BANK IN NASHVILLE and Nashville Bank and Trust Company, Defendants

Civ. No. 3849.

United States District Court, M. D. Tennessee, Nashville Division

Sept. 24, 1964.

The United States brought an antitrust action against two national banks, which had merged with approval of the Comptroller of the Currency. The Comptroller filed a motion for an order permitting him to intervene as a party defendant. The District Court, William E. Miller, Chief Judge, held that the Comptroller was not entitled to intervene under provision of Federal Rule of Civil Procedure dealing with intervention as of right, and that the District Court in exercise of its discretion would deny intervention under provision of Federal Rule of Civil Procedure dealing with permissive intervention.

Motion denied.

James L. Minicus, Charles A. Degnan, and Robert C. Weinbaum, Department of Justice, Washington, D.C., for plaintiff.

Frank M. Farris, Jr., of Farris, Evans & Evans, Edwin F. Hunt and Reber Boult, of Boult, Hunt, Cummings & Conners, Henry W. Hooker and John J. Hooker, Jr., of Hooker, Hooker & Willis, Nashville, Tenn., for defendants.

James J. Saxon, Comptroller of the Currency, pro se, Treasury Department, Washington, D.C., for intervenor.

WILLIAM E. MILLER, Chief Judge.

The Comptroller of the Currency has filed a motion for an order permitting him to intervene as a party defendant in the action. He insists, first, that intervention exists as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and, in the alternative, that the motion should be granted pursuant to the permissive intervention provisions of Rule 24(b)(2).

The pertinent language of Section 24(a)(2) is as follows:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." F.R. Civ. P. 24(a)(2).

In order to sustain the right to intervene under this section, the Comptroller would be required to demonstrate that he has a proper "interest" in the subject matter of the action, and in addition, that the representation of such interest by existing parties is or may be inadequate. The Court is convinced that neither condition has been satisfied and that the Comptroller's intervention cannot be sustained as a matter of right.

The Comptroller approved the merger of the Third National Bank in Nashville and Nashville Bank and Trust Company in a detailed opinion, pursuant to his authority under the Bank Merger Act of 1960, 12 U.S.C.A. § 1828(c). His contention is that if the plaintiff successfully pursues its complaint to its conclusion, this statutory authority will be nullified, or as he puts it "frustrated and defeated." The argument necessarily presupposes that the Bank Merger Act of 1960 and the antitrust statutes, under the authority of which the plaintiff brings the action against the defendant banks, cannot co-exist, a theory which appears clearly to have been rejected by the Supreme Court in United States v. Philadelphia National Bank, 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915:

"Nor did Congress, in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure. On the contrary, the legislative history of the Act seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected." 374 U.S. at 352, 83 S. Ct. at 1735.

"The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices * * * does not make federal banking regulation all-pervasive." 374 U.S. at 352, 83 S. Ct. at 1736.

That the Bank Merger Act of 1960 did not affect the applicability of the Clayton Act to bank mergers is made explicit by the Court in the following language:

"It should be unnecessary to add that in holding as we do that the Bank Merger Act of 1960 does not preclude application of § 7 of the Clayton Act to bank mergers, we deprive the later statute of none of its intended force. Congress plainly did not intend the 1960 Act to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects." 374 U.S. at 354, 83 S. Ct. at 1737.

As a result of the holding in Philadelphia, it would appear that there are two separate and distinct hurdles which must be cleared before consummation of a bank merger, concededly an occurrence often having widespread implications involving the public interest. First, merging banks must apply for and obtain approval from the Comptroller in accordance with his statutory authority to approve or disapprove mergers when the resulting bank is a national bank. Seven specific factors are enumerated in the Bank Merger Act which the Comptroller is required to evaluate in reaching his final decision. It is true that one of such factors which the Comptroller must consider is the effect of the proposed merger upon competition, but there is nothing in the statute indicating that the Comptroller is required to determine in a legal sense whether the proposed merger will be violative of the antitrust statutes. His function is to decide whether the merger will subserve the public interest after appropriately evaluating and considering all of the criteria specified in the statute, a range of inquiry in total effect much broader than the narrow issue of an antitrust violation.

When a bank merger has been disapproved by the Comptroller, no question arises for consideration by the Department of Justice under the antitrust statutes, but when the merger meets with the Comptroller's approval after consideration of the statutory standards, the Department of Justice still has the right and indeed the duty to challenge the merger under the antitrust statutes, if it is deemed that they have been or will be violated by the consummation of the merger. Under Section 7 of the Clayton Act the only consideration is whether the merger substantially lessens competition or tends to create a monopoly. The issue thus presented is confined to the anticompetitive effect of the merger, or whether the merger will be violative of the Clayton Act. On the other hand, under the Bank Merger Act of 1960, the issue is whether the merger should be approved as being in the over-all public interest based upon a variety

of economic factors and considerations which the Comptroller is required to consider.

It is obvious that a factual situation could exist which would warrant the Comptroller of the Currency in approving a proposed merger under the broad provisions of the Bank Merger Act, which would at the same time require condemnation of the merger when tested under the specific terms of the antitrust statutes. While the issues involved under the statutes are to some extent overlapping, they are not identical. The Comptroller is charged with the duty of either approving or disapproving the merger depending upon the weight and value which he gives to many considerations not related to competition, while the courts under the antitrust statutes are concerned with the narrow issue of competition alone.

It was apparently these or similar reasons which led the Supreme Court in the Philadelphia case to hold that the statutes have separate functions which coexist and complement each other, and it follows that the Comptroller's contention that a successful action under the antitrust statutes would tend to nullify his statutory authority under the Bank Merger Act of 1960 is not well taken. His authority was fully exercised and his responsibility fully discharged when he granted his approval of the merger. It is the responsibility of the courts in an action properly brought by the government acting through the Department of Justice to determine whether the merger, notwithstanding the fact that it has received the approval of the Comptroller, must be condemned as being in violation of the antitrust statutes.

The Court therefore concludes that the Comptroller, having fully exercised his statutory authority and duty, has no interest in the subject matter of the present action. For that reason alone he is not entitled to interview as of right under Rule 24(a)(2).

The alternative position of the Comptroller is that the provisions of Rule 24 (b)(2) of the Federal Rules of Civil Procedure apply and that his intervention should be allowed permissibly. The pertinent language of this subsection is as follows:

> "When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action."

It is not understood that the defendants rely upon the Comptroller's order approving the merger as a legal defense, as such, in this antitrust litigation, although they do insist that the Comptroller's decision on the competitive effect of the merger should be given considerable weight by the Court. But assuming without deciding that the requirement of "ground of * * * defense" has been met in the present action, intervention is still a matter within the sound discretion of the Court and may be denied even though the intervenor has met the technical requirements of the Rule. 4 Moore's Federal Practice, Sec. 24.10(5) at pp. 64–66, and Cumulative Supplement 1963 at p. 22, and the authorities cited therein.

The presence of the Comptroller in the action as a party defendant is not deemed necessary to place before the Court his views on the question of the competitive effect of the merger. As pointed out by the Court in its memorandum denying the plaintiff's application for a preliminary injunction, the Comptroller carefully and in great detail articulated in a memorandum or opinion his findings and conclusions and the reasons therefor bearing upon the question of competition. Such findings were of material assistance to the Court in arriving at its decision to deny the application for a preliminary injunction. They are a part of the record in the action and it is difficult to see what more the Comptroller could say in justification of his decision. Moreover, the defendant banks, represented by able and competent attorneys, have the strongest of reasons and motives to bend every effort to resist the government's case and to support the merger as against the contention that it is in conflict with the antitrust statutes. There can be no doubt that the defendants' contention that the merger is not violative of the antitrust statutes can be vigorously and adequately represented without the necessity of the Comptroller's intervention. The Court therefore considers it to be a sound exercise of the discretion conferred by Rule 24(b)(2) to deny the proposed intervention.

The fact that the plaintiff now seeks divestiture relief in this action and that effectuation of such relief may require certain action calling for approval of the Comptroller under the National Banking Laws is not a sufficient reason

to permit the Comptroller to intervene. If such divestiture should ultimately be ordered by the Court, the order would be, as pointed out by the plaintiff, directed to the defendants, requiring them to take the necessary steps to restore "the separate identities of the two merged banks." If it was necessary to invoke action of the Comptroller, it cannot be assumed that he would arbitrarily or unreasonably withhold approval of steps necessary to effectuate the relief which the Court considered necessary to avoid a violation of the antitrust laws. In any event, if it is necessary to have the Comptroller before the Court in order to effectuate relief or to provide an appropriate remedy, he can be made a party to the action when and if that contingency arises.

Finding no basis in law or in fact for the presence of the Comptroller in the action as a party at this time, his motion to intervene will be denied. An order to this effect has been approved by the Court on this date and passed to the Clerk for filing.

United States District Court

Southern District of New York

61 Civ. 3194

United States of America,

Plaintiff,

—against—

Manufacturers Hanover Trust Company,

Defendant.

OPINION OF LLOYD F. MacMAHON, *D.J.*

Appearances:

William H. Orrick, Jr., Esq.,
Assistant Attorney General,
John M. Toohey, Esq.,
Eugene Driker, Esq. and
Robert E. Kendrick, Esq.,
of counsel,
Department of Justice,
Washington, D.C.,
Attorneys for Plaintiff.

Simpson Thacher & Bartlett, Esqs.,
Whitney North Seymour, Esq.,
George B. Balamut, Esq.,
William J. Manning, Esq. and
Donald Oresman, Esq.,
of counsel,

Kelley Drye Newhall Maginnes & Warren, Esqs.,
Francis S. Bensel, Esq. and
Albert J. Walker, Esq.,
of counsel,
New York, N.Y.,
Attorneys for Defendant.

MacMahon, *District Judge*

The government, claiming violation of Section 7 of the Clayton Act (15 U.S.C. § 18)[1] and Section 1 of the Sherman Act (15 U.S.C. § 1),[2] seeks equitable relief undoing a merger of Manufacturers Trust Company and The Hanover Bank which resulted in the creation of defendant, Manufacturers Hanover Trust Company.

The merger has now been in effect for more than three years. It was consummated on September 8, 1961, shortly before this suit was filed,[3] following prior approval of the New York Superintendent of

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1 Section 7 of the Clayton Act provides in pertinent part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

2 Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

3 This action was one of several instituted by the Department of Justice around the country to test the applicability of the Clayton and Sherman Acts to bank mergers. The complaint was not filed and injunctive relief was not sought until a half hour after the merger had been consummated, although the government had been on notice of the proposal for many months. My Brother Cashin denied an application for a temporary restraining order on Saturday, September 9, 1961, after argument, apparently on the grounds that the government's application was tardy and failed to show a reasonable probability of ultimate success in view of the novelty of the case and the then unsettled state of the law. *Cf. United States* v. *Crocker-Anglo National Bank*, 223 F. Supp. 849 (N.D. Cal. 1963). An application for a preliminary injunction reached the Motion Part on Tuesday, September 12, 1961, after the merger had been in effect and the assets scrambled for four days. The government, therefore, withdrew the application for a preliminary injunction and applied for an alternative order directing segregation of the assets of the merged banks *pendente lite*. On oral argument, counsel represented that there was relatively little dispute about the evidentiary facts. The court, therefore, suggested immediate pretrial conference with a view to expediting procedures for the submission of additional evidence and a prompt trial on the merits. Conferences were held, procedures devised for presentation of additional evidence, and a timetable for argument of motions and trial was arranged. Accordingly, the government withdrew its application for segregation of the assets *pendente lite*.

Most of the evidence was presented by stipulation and affidavits subject to the opposing party's right to call any affiant for cross-examination. Trial began on December 6, 1961, and further hearings were held on December 8 and 14, 1961 and March 8, 1962. Proposed findings of fact, conclusions of law, and

Banks, as required by the New York Banking Law,[4] and of the Board of Governors of the Federal Reserve System, as required by the federal Bank Merger Act.[5] Both the state and federal statutes require

briefs were submitted during January, February, March and April 1962. At that juncture, the court became engaged in a protracted conspiracy trial which continued through June 1962. See *United States* v. *Bentvena*, 319 F. 2d 916 (2 Cir.), cert. denied, 375 U.S. 940 (1963). In the interim, the Supreme Court on May 21, 1962 noted probable jurisdiction in *United States* v. *Philadelphia National Bank*, 369 U.S. 883 (1962), and, with counsel's consent, this matter was held under advisement awaiting the *Philadelphia* opinion. The opinion was rendered on June 17, 1963 (374 U.S. 321), holding the Clayton Act applicable to bank mergers, but leaving for later decision in *United States* v. *First National Bank & Trust Co. of Lexington* the question of whether the Sherman Act also applied. Following *Philadelphia*, at counsel's request, the record was reopened for presentation of supplementary evidence by both sides. Further testimony was taken on September 4, 1963, and revised findings and briefs were submitted during September and October 1963. Final argument was held on January 17, 1964. The *Lexington* opinion came down in April 1964 (376 U.S. 665) and was followed by a series of merger decisions during April and June, all of which have an important bearing on this case. A number of informal post-trial conferences were held with counsel, the last on December 16, 1964, for the purpose of receiving voluminous stipulated supplementary evidence material to issues raised by the series of post-trial decisions.

4 N.Y. Banking Law § 601-b provides in pertinent part: "In determining whether to so approve [a bank merger], the superintendent shall take into consideration . . . whether the effect of such merger or acquisition shall . . . result in a concentration of assets beyond limits consistent with effective competition, . . . whether such merger or acquisition may result in such a lessening of competition as to be injurious to the interests of the public or tend toward monopoly and . . . primarily, the public interest and the needs and convenience thereof."

5 The Federal Deposit Insurance Act (12 U.S.C. § 1828(c)) provides in pertinent part: "No insured bank shall merge or consolidate with any other insured bank . . . without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). . . . In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger . . . the appropriate agency shall also take into considera-

the respective banking agencies to consider not merely banking factors and the overall public interest before approving a merger but also the effect of the transaction on competition, including any tendency toward monopoly.

Both agencies approved the merger, without adversary hearings, but after consideration of documentary evidence, statistical data, investigation, and, in the case of the Board, the reports of the Attorney General, the Federal Deposit Insurance Corporation (F.D.I.C.), and the Comptroller of the Currency, and interrogation of officers of the merging banks relative to the merger's competitive effect. The Superintendent concluded, after thorough analysis of relevant data, that the merger "would not result in a concentration of assets beyond limits consistent with effective competition. The proposed merger would not result in such a lessening of competition as to be injurious to the interest of the public, nor in such a lessening of competition as to tend toward monopoly." The Board, despite objection on antitrust grounds interposed by the Attorney General, concluded, with the concurrence of the Comptroller of the Currency, that the merger would have no adverse competitive effect but "would tend to stimulate competition without significantly affecting the number or competitive strength of alternative sources of banking services." The F.D.I.C found the pro and anti competitive effects of the merger so in balance that it based its approval on banking factors and the public interest.

The government makes no claim that the agencies relied on incorrect facts or misapplied the statutory standards under which they operate. It does not seek to review their decisions. Rather, it invokes

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tion the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger . . . the agency . . . shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. . . . The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger . . . approved by it during the period covered by the report, along with the following information: the name and total resources of each bank involved; whether a report has been submitted by the Attorney General hereunder, and, if so, a summary by the Attorney General of the substance of such report; and a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval."

original jurisdiction of this court under the antitrust laws[6] asking us to destroy a merger which the banking agencies validated. The government contends that the merger is a combination in unreasonable restraint of trade, violative of Section 1 of the Sherman Act, and that its effect "may be substantially to lessen competition or to tend to create a monopoly," violative of Section 7 of the Clayton Act.

We state at the outset that there is no evidence of predatory conduct, anticompetitive behavior or motive, conspiracy, price-fixing, or any other intentional injury to competitors or to the public either by the constituent banks, the resulting bank, or any of its largest competitors. The government asserts, however, that an inference of the proscribed anticompetitive effect in commercial banking in the City of New York, the metropolitan area, and the United States is compelled by market structure, specifically, the size of the constituent banks, the permanent elimination of Hanover as a separate competitor, the resulting bank's size and its share of the relevant markets, a history of mergers and a trend toward concentration, and the increase in concentration caused and threatened by the merger.

Defendant contends that the facts give rise to no anticompetitive inference in the relevant markets and that the government has failed to prove its case. It argues that the government inflates its relative size by commingling the local and national markets, that mere size is not an offense, that mergers of competitors are not *per se* unlawful, that the merger has not eliminated significant competition, that the resulting bank does not control an undue share of the relevant markets, that concentration has not been unduly increased, and that customers are well served by numerous, strong and vigorous competitors, both locally and nationally.

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6 Section 4 of the Sherman Act (15 U.S.C. § 4) provides in pertinent part: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of section 1-7 of this title. . . ." Section 15 of the Clayton Act (15 U.S.C. § 25) provides in pertinent part: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States Attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

Jurisdiction—The Effect of Agency Approval

Defendant, caught in a cross fire, originally challenged the court's jurisdiction over the subject matter. A similar argument was made unsuccessfully in the district court, but abandoned on appeal, in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350 n.26 (1963). As a result, it was briefed but not argued on appeal by the government, and neither briefed nor argued by the banks. Nevertheless, it was considered but rejected by the Supreme Court. We are bound, therefore, to reject it here, whatever its merit.

Defendant does not press the point.[7] Instead, it urges that we should regard the opinions of the impartial banking agencies as extremely persuasive evidence. It points to the government's failure to produce any material evidence here which was not before, or within the knowledge of, the banking agencies, to the similarity of the statutory standards governing the agencies' consideration of the competitive factor to those of the antitrust laws, and to the agencies' application of antitrust principles in their analyses of the competitive effect of the merger.

The government, however, relying on *Philadelphia,* contends that we must judge the validity of the merger under a different standard from that governing the banking agencies and are bound, therefore, to assess its competitive effect on the basis of established antitrust principles, independent of the opinions of the banking agencies. In support of its position, the government asserts that the Bank Merger Act does not authorize the Federal Reserve Board to decide antitrust questions *as* such, *United States* v. *Radio Corporation of America,* 358 U.S. 334 (1959), and stresses the Board's required consideration of public interest factors, irrelevant to the antitrust laws, and the lack of adversary hearings.

In view of the Supreme Court's decisions in *United States* v. *Philadelphia National Bank, supra,* and in *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U.S. 665 (1964), there is no longer any question that the Clayton and Sherman Acts apply to bank mergers and that the Bank Merger Act neither impairs the plenary

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7 Defendant does not abandon the point and is entitled to preserve it for appeal especially in view of the fact that its abandonment in *Philadelphia* was obviously a tactical choice by counsel for the banks, and, as a result, the Bank Merger Act lost the day without the benefit of adversary argument.

jurisdiction of this court to adjudicate their validity, nor immunizes them from collateral attack here despite agency approval. It does not follow, however, that the court should ignore agency views.

Primary Jurisdiction

In *United States* v. *Philadelphia National Bank, supra,* the Supreme Court rejected an argument that the doctrine of primary jurisdiction should be applied to the Comptroller's approval of that merger under the Bank Merger Act. We think, however, that there are facts here, not present in *Philadelphia,* which, with all respect call for a contrary holding and *ad hoc* application of the doctrine of primary jurisdiction to the claim made under Section 7 of the Clayton Act.

This merger was effected by an acquisition of assets. There can be no question since *Philadelphia* that Section 7 of the Clayton Act has always applied to such bank mergers. *Philadelphia and Lexington* also make clear, as the government puts it, "that the Bank Merger Act of 1960 does not in any way diminish the full thrust of the Sherman and Clayton Acts in bank merger cases."

An integral and vital part of the "full thrust" of the Clayton Act is Section 11 (15 U.S.C. § 21), which unequivocally vests "authority to enforce compliance" with Section 7 "in the Federal Reserve Board where applicable to banks." That statute has never been repealed by Congress notwithstanding its amendment of Section 7 in 1950. Referring to it in a footnote in *Philadelphia,* the Supreme Court said: " . . . The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted, we think, whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers." (374 U.S. at 344-345 n.22.)

Whatever validity *pro tanto* repeal of Section 11 by implication may have had in *Philadelphia,* we think there is neither reason, nor basis, for such drastic surgery here. Repeal by implication on the facts in this case would be a radical departure from settled procedents.

We have been taught by a long line of decisions, including *Philadelphia,* that of all the instruments for accommodation of regulatory statutes to the antitrust laws, *pro tanto* repeal of the antitrust laws by implication is the very last that ought to be employed. Indeed, we

have been urged to strain the doctrine of primary jurisdiction, if necessary, to avoid such a result. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 320-321 (and cases cited therein) (1963) (Brennan, J., dissenting).

In *United States* v. *Borden Co.,* 308 U.S. 188, 197-206 (1939), the court emphasized that where a later regulatory statute, such as the Bank Merger Act, shares common ground with the antitrust laws, we should not resort to repeal of the antitrust laws by implication unless there is "a positive repugnancy," and then only to the extent of the repugnancy. There is no need to labor the point; its roots go deep.[8]

There is no repugnancy, positive or otherwise, between the Bank Merger Act and Clayton § 11 in their application to the facts of this case. That is why, with deference, the Supreme Court's refusal to apply the doctrine of primary jurisdiction in *Philadelphia* is not controlling here.

In *Philadelphia, pro tanto* repeal of Clayton § 11 by implication was grounded on a positive repugnancy resulting from the fact that the Bank Merger Act mandated sole authority to approve that particular merger to the Comptroller of the Currency. Such authority in the Comptroller is clearly repugnant to the Federal Reserve Board's sole authority under Clayton § 11 to enforce compliance with § 7. In this case, however, because the banks involved are state banks, the Bank Merger Act vests sole authority to approve the merger in the Federal Reserve Board (12 U.S.C. § 1828(c)(3)(ii)). Advisory roles only are assigned to the F.D.I.C., the Comptroller of the Currency, and the Attorney General, and the Board is in no way bound by their reports.

Clearly there is no repugnancy between sole power in the Board under the Bank Merger Act to prohibit or approve a merger in advance of its consummation, and its power under Clayton § 11 to enjoin or acquiesce in its consummation. Quite the contrary. Power

8 *United States* v. *Philadelphia National Bank, supra,* at 350 (and cases cited therein); *Pan American World Airways, Inc.* v. *United States, supra* (dissenting opinion); *California* v. *Federal Power Comm'n,* 369 U.S. 482, 485 (1962); *United States* v. *Borden Co., supra; Terminal Warehousing Co.* v. *Pennsylvania R.R.,* 297 U.S. 500, 513-515 (1936); *Central Transfer Co.* v. *Terminal R.R. Ass'n,* 288 U.S. 469, 474-475 (1933); *Keogh* v. *Chicago & N.W. Ry.,* 260 U.S. 156, 161-162 (1922); *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 314 (1897); *Henderson's Tobacco,* 78 U.S. [11 Wall.] 652, 657 (1870); *United States* v. *Tynen,* 78 U.S. [11 Wall.] 88, 92 (1870).

under the Bank Merger Act to destroy the seed before it sprouts is perfectly consistent with power under Clayton §§ 11 and 7 to nip incipient restraints and monopolies "in the bud" or order divestiture. (See *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 166, 169 (3 Cir.), cert. denied, 346 U.S. 901 (1953).)

Every single reason upon which *Philadelphia* predicates its holding that the Bank Merger Act did not repeal Clayton § 7 by implication applies here with even greater force to Clayton § 11.[9] Clayton § 11 suffers from none of the infirmities of the impotent Bank Merger Act. It grants express authority to the Board to enforce compliance with Section 7, provides for hearings, intervention by the Attorney General, findings of fact, and appeal to the Court of Appeals. Authority to enforce compliance empowers the Board to decide antitrust issues *as such*, to enlist the injunctive aid of the courts (*Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (9 Cir. 1950); *contra, Federal Trade Comm'n* v. *International Paper Co.*, 241 F. 2d 372 (2 Cir. 1956)), or to fashion appropriate relief, including divestiture, by its own decree (15 U.S.C. §21(b); *Pan American World Airways, Inc.* v. *United States, supra*, at 312-313 nn. 17 & 18). We see no conceivable reason on the facts of this case for repealing by implication this comprehensive legislative plan for Board enforcement of Section 7. We hold, therefore, that Clayton § 11 applies to this case.

The Clayton Act, however, contains a scheme of dual enforcement.[10] *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 631 (1953). The Board's jurisdiction to enforce Section 7 "where applicable to banks" is, therefore, not exclusive but concurrent with the district court's jurisdiction under Section 15 of the Clayton Act (15 U.S.C. § 25). It seems obvious that Congress intended that the technical and complex problems involved in the application of Clayton § 7 to the

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9 Thus, the Bank Merger Act contains no specific provision repealing Clayton § 11; nor does it immunize approved mergers from § 7 or § 11. The legislative history "of the Act seems clearly to refute any suggestion that the applicability of the antitrust laws was to be affected." The Act gives no authority to enforce the antitrust laws; nor does it state what weight is to be given to the competitive factor or provide for hearings or judicial review.

10 See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 664 (1964) (Harlan, J., dissenting), suggesting that this "duplicative" anachronistic system of dual regulation should be reexamined. The duplicative work which this very case imposes upon the parties and this congested court is proof positive of the merits of the suggestion.

banking industry should be resolved, at least in the first instance, by a body of experts who know the competitive realities of the banking business. Indeed, the legislative histories of both Clayton § 11[11] and the Bank Merger Act[12] are replete with that very theme.

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11 Section 11 of the original Clayton Act was no mere accident or afterthought. Rather, its terms mirror a very basic conflict which then divided the houses of Congress. The bill, as first proposed by the House, would have made all violations, including Section 7, punishable by fine or imprisonment (H. Rep. No. 627, 63d Cong., 2d Sess. 3 (1914)). This penal approach was rejected by the Senate which, by amendment, struck the criminal sanctions and substituted in their place enforcement by government agency (S. Rep. No. 698, 63d Cong., 2d Sess. (1914)). "This was done because it was thought best, especially in view of the experimental stage of this legislation, that the harshness of the criminal law should not be applied but that enforcement . . . should be given to . . . [the appropriate agency]." S. Rep. No. 698, 63d Cong., 2d Sess. 43 (1914). The Federal Reserve Board, however, was not at that time numbered among those agencies. The Board's absence is explained by the Senate's treatment of the House proposals. Included in the initial draft was a provision prohibiting interlocking directorates between certain categories of banks but this was deleted by the Senate. The Senate "believed that such legislation as this more properly belongs to the domain of banking rather than of commerce and such additional regulation . . . as may be wise and just should be made by amendments to the national bank acts, and the enforcement of it given to the Comptroller of the Currency and the Federal Reserve Board." S. Rep. No. 698, 63d Cong., 2d Sess. 48 (1914). The House vigorously opposed what it called the Senate's process of "emasculation," but the Senate was equally adamant in defense of its position (51 Cong. Rec. 16170, 16344). The gist of the arrangement, in pertinent part, was that the Senate agreed to the inclusion of banks in the scheme of antitrust legislation, while the House acceded to the Senate's method of enforcement. And it is here, in the Conferee's rewritten Section 11, that the Federal Reserve Board first appears as an enforcing arm of the statute (S. Doc. Nos. 583 & 585, 63d Cong., 2d Sess. 6 (1914)). It is obvious, then, from even a cursory examination of the Clayton Act, through its stages of development to the final compromise, that it was the Senate's insistence upon keeping the control of banking, including antitrust matters, in the hands of banking experts that carried the day in Congress and therefore represents its true intent.

12 "This [the Bank Merger Act] puts the responsibility for acting on a proposed merger where it belongs—in the agency charged with supervising and examining the bank which will result from the merger. Out of their years of experience in supervising banks, our Federal banking agencies have developed specialized knowledge of banking and the people who engage in it. They are experts at judging the condition of the banks involved, their prospects, their management, and the needs of the community for banking services. They should have *primary responsibility* in deciding whether a proposed merger would be in the public interest." 106 Cong. Rec. 7257 (1960) (emphasis supplied). See S. Rep. No. 196, 86th Cong., 1st Sess. 3-8 (1959), where the Committee approves the statutory scheme placing banking under the agencies. See also *id.* at 21; 106 Cong. Rec. 9711 (1960) (remarks of Senator Fulbright).

We think that if ever there were a field requiring administrative expertise to unravel the tangled threads of the evidence and weave them into a meaningful fabric, this is it. This case involves a multitude of technical, intricate and complex problems in the field of money and banking, a subject within the special competence of the Board and outside the conventional experience of judges.

The Board is intimately familiar with this technical subject matter, as well as the competitive realities involved, from its long experience as the administrator of the nation's banking system, periodic reports, examinations, studies, etc. It knows the relevant products; the parties to this merger and the pattern of their business; the extent, locus and significance of previous competition between them; the number, strength and pattern of business of remaining competitors and the vigor of competition, both locally and nationally; the banking habits of all customers, great and small; their practicable banking alternatives; the geographic areas of effective competition for their banking business; the history, interrelationships and trends of the geographic markets; the probable impact of the merger on depositors, borrowers and competitors, great and small, local and national; the degree of concentration, locally and nationally; the reasons for it and its affect on the competitive picture; the operations of the nation's money markets; and the affect of the government's monetary and fiscal operations on the markets and the impact of this merger upon them.

The fact that the banking agencies know the banking business undoubtedly explains why the evidence before us, which was largely prepared for the agencies, contains so little to acquaint us with the industry. As we shall see, the record is inadequate to the point that there is no direct evidence as to the market shares of the banks involved or any of their competitors in either of the relevant geographic markets. We have been obliged, therefore, to resort to circumstantial evidence, with all its imperfections, at many vital points in order to decide this case. We have also been compelled to dredge through reference material and take judicial notice of essential information which the Board knows, or could gather, out of hand.

Much of the evidence consists of stale statistics and studies prepared for other purposes by the Board or other banking agencies. Often, the only information available is many years old and is a precarious basis for decision in this rapidly changing world. Many statistical facts which we need are either wholly lacking or so scrambled

as to be useless. The Board has the staff and facilities to obtain the missing pieces of the puzzle and to organize the swamp of statistics into a meaningful pattern. Our tedious efforts, at best, have left distressing gaps in pertinent information. These considerations, we think, cry out loud for application of the doctrine of primary jurisdiction.[13] *Whitney National Bank* v. *Bank of New Orleans*, 33 U.S.L.W. 4153 (Jan. 18, 1965).

Ordinarily, application of the doctrine of primary jurisdiction would require either dismissal of the action, thereby relegating the parties to the Board and the Court of Appeals, or suspension of the judicial process pending referral of the issue to the Board for its views. *Far East Conference* v. *United States*, 342 U.S. 570, 576 (1952). We think, however, that resort to either course at this stage of the litigation would be little short of ridiculous.

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13 " 'Primary jurisdiction,' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433.

"No fixed formula exists for applying the doctrine of primary jurisdiction In every case the question is whether the reasons for the existence of the doctrine are present and whether the purpose it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference* v. *United States*, 342 U.S. 570. The two factors are part of the same principle,

'now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' *Id.*, at 574-575.

"The doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural time table of the lawsuit.' . . ." *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 63-65 (1956).

There are compelling practical reasons for refusing to shuffle this ase back and forth between court and agency and for meeting the roblem in a different and novel way. The litigation has already een prolonged awaiting the outcome of the *Philadelphia* and *Lexing-on* cases, the presentation of additional evidence, revised findings, riefs, and this court's labors.

All the evidence which the parties have desired to present is now efore us, and to relegate the matter to the Board for still further pro-eedings would greatly increase the length and cost of the litigation, xhaust the litigants, delay ultimate determination, serve no useful urpose, and defeat the ends of justice. The court must decide the herman Act claim in any event, and, since it poses issues requiring uch the same analysis and consideration as those under the Clayton ct, the economies of judicial administration demand decision of both laims now. Finally referral to the Board would be an idle gesture nposing needless duplication of effort for, although the Board's opin-on is short of factual analysis, and not of much help to the court, e already have the benefit of its ultimate conclusion which was ased on facts set forth in the application to merge or otherwise within s knowledge. The Board also had the benefit of the thorough analysis f the New York Superintendent of Banks and the F.D.I.C.

The doctrine of primary jurisdiction is flexible, and we should shape and, if necessary, strain it to fit the peculiar posture of this case in rder to reach a practical accommodation of court and agency. The oard approved this merger long before the *Philadelphia* decision. It ever invoked jurisdiction under Clayton § 11 for it was undoubtedly boring under the common mistake that Clayton § 7 did not apply to ank mergers effected by an acquisition of assets.[14]

Although the Board failed to make helpful findings of fact, there no reason to suppose that its views about the competitive effect of is merger would have been any different from what they were under e Bank Merger Act if it had predicted the outcome of *Philadelphia* nd invoked jurisdiction over this merger under Clayton § 11. This llows, first, from the fact that the evidence is largely undisputed and

4 "Section 7 of the Clayton Act covers only acquisitions of bank stocks and since bank mergers rarely, if ever, involve stock acquisitions, they are beyond the scope of that Act. Thus, there is presently a gap in the coverage of bank mergers by Federal Law." Hearings on S. 1062 before Senate Committee on Banking and Currency, 86th Cong., 1st Sess. 65 (1959) (statement of J. L. Robertson, Member, Board of Governors, Federal Reserve System).

there is little material evidence here which was not before, or within the knowledge of, the Board when it approved this merger under the Bank Merger Act, and, second, from the fact that the norm for assessing the competitive effect of a merger under that Act is substantially indistinguishable from that laid down in the antitrust laws.

We do not understand what sort of issues bear on the effect of a merger on competition, including any tendency toward monopoly, unless they be antitrust issues. Nor does the government offer any suggestions, although pressed to do so on oral argument. A clearer or more comprehensive grant of power to consider antitrust questions is difficult to conceive. Language far less specific (unfair competition) passed muster in *Pan American World Airways, Inc.* v. *United States, supra,* at 306-307.

Plainly, the Board is required to consider all the ramified competitive effects of a merger on competition. Necessarily, that broad authority requires consideration of the narrower question of whether, in any line of commerce in any section of the country, the effect of a particular bank merger may be a combination in restraint of trade, or a monopoly,[15] or a substantial lessening of competition, or to tend to cretate a monopoly.

We think it too clear for argument that such rudimentary questions lie at the threshold of the most cursory consideration of "the effect of the transaction on competition, including any tendency toward monopoly." That this is so is further apparent on the face of the statute from its mandatory requirement that, in the interest of uniform standards, before approving a merger, the Board "shall request" a report on "the competitive factors involved" from the Attorney General, as well as the other two bank supervisory agencies. There is no point whatever in requiring such a report from the Attorney General unless it be to insure that his special competence on antitrust questions *as such,* particularly the impact of the Sherman and Clayton Acts on the proposed merger, is brought to bear on the Board's consideration of its competitive effect.[16] This is evident on the face of the report of the Assistant Attorney General in charge of the Anti-

15 There is no claim here under Section 2 of the Sherman Act.

16 "This report was required in order that the Attorney General's knowledge and background of experience in the field of anticompetitive and monopolistic matters should be made available to the banking agencies in their consideration of bank mergers." 106 Cong. Rec. 9712 (1960). See S. Rep. No. 196, 86th Cong., 1st Sess. 23, 24 (1959).

rust Division of the Department of Justice, submitted to the Board ı this very case.[17] As we shall see, his report was superficial and ermeated with erroneous assumptions of fact as well as errors of law. t cannot be gainsaid, however, that it purported to be an opinion on ntitrust questions *as such*. Thus, the ultimate antitrust issues raised ere were component ingredients of the competitive factors which the oard was required to, and did, consider and decide in approving e merger.

It is absurd to suppose that Congress intended merely to burden e Board with vain contemplation. Rather, we must assume that Conress had some meaningful purpose, when it enacted a specific statte like the Bank Merger Act, of sole application to particular transtions in a single industry. That purpose, on the face of the statute, as to grant the agencies broad authority not only to weigh and conider all the antitrust questions involved, but also to make a meaningıl judgment about them, along with the banking factors, as essential mponents of the ultimate standard of public interest. Thus, the Bank Ierger Act, to the extent that it deals with competitive factors inolved in a merger *per se*, shares common ground with the Sherman and layton Acts. The Acts differ, however, in at least two important espects:

First, the sole standard for determining the validity of a merger nder the Sherman and Clayton Acts is the actual or potential antimpetitive effect, while under the Bank Merger Act, the overall public terest, and not the anticompetitive effect, is the governing criterion. hus, the Bank Merger Act would appear to sanction agency approval a merger, even though it violated the antitrust laws, if, on a balance all the designated factors, the agency decided that, nevertheless, it as in the overall public interest.[18] A court, however, would be obliged

7 "The immediate effects of the proposed merger of Manufacturers Trust and Hanover will be to substantially increase the high degree of banking concentration in the financial capital of the nation, eliminate substantial existing and potential competition between the merging banks, further adversely affect the ability of smaller banks to effectively compete with New York's large banks, and increase the tendency toward monopoly (oligopoly) in commercial banking in New York City and the New York metropolitan area. It will also have an adverse effect on commercial banking in the United States as a whole."

8 "In any given merger, competitive factors unfavorable to the merger may be outweighed by banking factors favorable to the merger. . . ." 106 Cong. Rec. 9712 (1960) (remarks of Senator Fulbright). "In cases such as these, the benefits would be demonstrable, the merger would be a 'good merger,' and

to invalidate a merger found to violate the antitrust laws even though it served the public interest.[19] The difference in controlling standards, the lack of a pervasive regulatory scheme, the absence of an express exemption from, or repeal of, the antitrust laws, and the failure of the Act to provide for adversary hearings led the Supreme Court in *Philadelphia* to the conclusion that, since repeals by implication are not favored, neither the Bank Merger Act, nor agency approval of a merger, immunized the merger from challenge under the antitrust laws. *United States* v. *Philadelphia National Bank, supra,* at 351; *California* v. *Federal Power Comm'n, supra; United States* v. *Radio Corporation of America, supra.*

We think that the lack of adversary hearings in this case is of no practical significance because the material evidentiary facts were before the Board, and they were, and still are, largely undisputed. Thus, there was nothing to hear but argument, and the Attorney General provided that in his written report.[20] Nor is it of any moment that the Bank

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approval should be granted in spite of the lessening of competition." Congress wanted "to make crystal clear its intention that the various banking factors in a particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision." S. Rep. No. 196, 86th Cong., 1st Sess. 20, 24 (1959).

19 *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 565 (E.D. Pa. 1960), aff'd, 365 U.S. 567 (1961); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 617-618 (S.D.N.Y. 1958). See *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957). The government originally seized upon the difference in standards to support its argument that the Bank Merger Act did not repeal Section 7 by implication. That argument, we think, carried to its logical conclusion, cuts the other way for the difference in standards is precisely the source of a clear conflict between later and earlier statutes on the same subject. That might well lead to repeal of the antitrust laws by implication or resort to the doctrine of primary jurisdiction to avoid that drastic result. *Cf. Pan American World Airways, Inc.* v. *United States, supra.* See Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994 (1961).

20 We think, in the circumstances, that the Attorney General's report is akin to intervention under Clayton § 11 and the Board's decision tantamount to a summary judgment from which the Attorney General could have appealed under Clayton § 11 or, perhaps, the Administrative Procedure Act, 5 U.S.C. § 1009. See 1 Davis, Administrative Law (1958) § 7.07; *id.*, 3 Davis §22.15. Were it not for dual enforcement and the lack of a "pervasive regulatory scheme" governing the commercial banking industry, the government's grievances in this court might be barred on principles of collateral estoppel or *res judicata. Cf. United States* v. *Radio Corporation of America, supra; Pan American World Airways, Inc.* v. *United States, supra.* See 2 Davis, Administrative Law (1958) § 18.02, pp. 554-55.

Merger Act fails to state what weight shall be given to the competitive factor, for that argument is germane only if the agency finds a merger anticompetitive but approves it anyway because of favorable banking factors, which was not the situation here.

Second, the Sherman and Clayton Acts do not prohibit mergers outright but forbid only those having a specified anticompetitive effect, and neither Act contains any provision for prior approval, while the Bank Merger Act unqualifiedly prohibits all mergers between insured banks without prior written consent of the designated bank supervisory agency. This difference is not discussed in *Philadelphia,* but it is important to the question of what weight we should give to Board approval of this merger. The obvious purpose of such a provision was to plug a loophole in Clayton § 7[20(a)] to the end that anticompetitive mergers would be blocked in their incipiency and to enable customers, businessmen, and the community to place confidence in the lawfulness and stability of approved mergers. *Cf. United States* v. *Philadelphia National Bank, supra,* at 362.

The legislative history shows that Congress was mindful that, in essence, commercial banks, unlike industrial corporations, are akin to fiduciaries entrusted with depositors' money. After all, the Bank Merger Act is part of the Federal Deposit Insurance Act and partakes of its purpose to safeguard depositors from loss and rival banks from failure which might result if a merger threatened destructive competition. Nor should we ignore the Board's interest, as the nation's monetary manager, in preserving vigorous competition and ample banking alternatives to insure that credit is neither too scarce, nor too hard to get, nor too dear. The competitive effect of this merger, therefore, was, and will continue to be, of vital concern to the Board.

Plainly, Congress sought to minimize, if not to remove, the hazards, vagaries, burdens, and penalties which might be visited upon depositors, business, and the community if an approved bank merger were later found by a court to be illegal under the antitrust laws. It recog-

20(a) Clayton § 7 provides that nothing in it shall apply to transactions duly consummated pursuant to authority given by the CAB, the FCC, the FPC, the ICC, the SEC, the USMC, and the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. The obvious reason for the omission of the FRB was that at the time of the amendment to § 7 in 1950, the Board had no authority to grant prior approval, a loophole in the Clayton Act plugged by the Bank Merger Act.

nized that the unscrambling complexities inherent in divestiture, troublesome enough in other industries, might well wreak havoc upon a bank, with incalculable harm to depositors, borrowers, and the public weal.[21] Indeed, those considerations were the theme of the government's tardy application for a temporary restraining order in this very case.

We think all of the foregoing considerations compel us to heed the views of the Board. "After all, these antitrust problems are largely factual and their true solution depends in the last analysis upon intimate familiarity with the characteristic features of a particular industry in which these problems arise." *United States* v. *Morgan,* 118 F. Supp. 621, 699 (S.D.N.Y. 1953). It seems obvious, therefore, that we should treat the Board's views as though they had been rendered under Clayton § 11.

We do not stop to inquire whether our function is, therefore, limited to review. Rather, because Clayton § 11 itself provides that *no* order of the Board confers immunity under the antitrust laws, the decision in *Philadelphia,* our plenary jurisdiction, and the novel posture of this case, we will accept the agencies' views about banking facts, including the nature of the business of the constituent banks, the existence and locus of effective competition for all types of accounts, and the practicable banking alternatives of particular classes of customers as persuasive and helpful evidence in our analysis of the competitive effect of this merger, *International Shoe* v. *Federal Trade Comm'n,* 280 U.S. 291, 299 (1930), but the agencies' conclusions of law on antitrust questions as such, including the competitive effect of this merger, are not binding upon us in our independent application of the antitrust laws. *United States* v. *Philadelphia National Bank, supra,* at 367; *United States* v. *Morgan, supra,* at 699; 7 Wigmore, Evidence § 1918,

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21 "The advance approval feature is important in halting bank acquisitions before they are consummated and in preserving the depositors' confidence in an institution which might otherwise be *destroyed* by an attempt to unscramble assets after an acquisition has been completed." S.Rep. No. 196, 86th Cong., 1st Sess. 22 (1959) (emphasis added). Quoting Berle, Banking Under the Anti-Trust Laws, 49 Colum. L. Rev. 589, 592 (1949), Congress noted that: "A bank failure is a community disaster, however, wherever, and whenever it occurs." S.Rep. No. 196 86th Cong., 1st Sess. 18, 19 (1959). Congress was fully cognizant that "the very nature of the banking business would make it well nigh impossible to restore the status quo." Hearings on S.1062 Before Senate Committee on Banking and Currency, 86th Cong., 1st Sess. 66 (1959) (statement of J. L. Robertson, Member, Board of Governors, Federal Reserve System). See Funk, Antitrust Legislation Affecting Bank Mergers, 75 Banking L. J. 369, 381 (1958).

p. 10; § 1952, p. 81 (3d ed. 1940). Anything less would turn the Bank Merger Act into a trap so repugnant to fundamental fairness that it would make a mockery of a court of equity. The principal reasons for the doctrine of primary jurisdiction are the need for expertise and orderly and sensible coordination of agencies and court. See 3 Davis, Administrative Law (1958) § 19.01.

We find nothing in *Philadelphia* requiring us to disregard the Board's views. On the contrary, the Supreme Court took pains to note that its holding did not deprive the Bank Merger Act of its intended force or thwart its objectives (374 U.S. at 354) and, indeed, in its own analysis of the antitrust questions presented, found help in the views of the banking agencies (374 U.S. at 361). We recognize, however, that in leaving bank mergers subject to the antitrust laws, Congress intended that their validity should be definitively judged, not by the banking agencies, however expert in the banking field, but by judges presumably skilled in antitrust adjudication. We turn to that task.

THE FOUNDATION FOR ANALYSIS OF THE COMPETITIVE EFFECT OF THE MERGER UNDER THE ANTITRUST LAWS.

The Statutory Tests.

The ultimate question under Sherman § 1 is whether the merger constitutes a combination in unreasonable restraint of trade. *United States* v. *First National Bank & Trust Co. of Lexington, supra; United States* v. *Columbia Steel Co.,* 334 U.S. 495, 522 (1948); *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911). The question under Clayton § 7 is whether the effect of the merger may be substantially to lessen competition or to tend to create a monopoly in the relevant market. *United States* v. *Philadelphia National Bank, supra,* at 362.

As the Supreme Court noted in *United States* v. *Philadelphia National Bank, supra,* these are not the kind of questions which are "susceptible of a ready and precise answer." They require "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future. ... Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive." 374 U.S. at 362. Obviously the structure of the relevant market and the competitive effect of a

given merger vary with the setting and unique facts of each case. ***Brown Shoe Co.*** v. ***United States,*** 370 U.S. 294, 322 n.38 (1962). As we shall see, the market facts here are so different from those in ***Philadelphia*** and other recent merger decisions of the Suprme Court under Clayton § 7 that those cases do not supply "a ready and precise answer" to the questions raised in this one.

The primary problem in ascertaining market structure under either the Sherman or Clayton Acts is definition of the product (relevant product or services market) and "section of the country" (relevant geographic market) in which to appraise the actual or probable competitive effect of the merger. *United States* v. *First National Bank & Trust Co. of Lexington, supra; United States* v. *Philadelphia National Bank, supra; United States* v. *E.I. du Pont de Nemours & Co., supra; United States* v. *Columbia Steel Co., supra.*

Market Structure.

A. *The Economic Setting.*

The structure of the relevant market, like the structure of anything else, starts with a foundation. Commercial banks provide a broad range of sevices built upon the needs of their customers. Those needs—from the smallest deposit to the largest loan—are created by, and vary with, the forces of the underlying economy.

This case centers on the merger of two New York banks. A realistic grasp of the economy of metropolitan New York and its links with the rest of the nation and the world is essential to understand the commercial banking structure built upon it, define the relevant product and geographic markets, and view the competitive picture in true perspective.

Commercial banking in metropolitan New York is built upon a massive economic foundation. New York has long been the largest city in the nation and is now the third largest in the world.[22] It has a cosmopolitan population of almost 8,000,000,[23] another 7,000,000 live

22 New York's population of 7,781,984 is exceeded by that of Tokyo, Japan with 9,311,774 (May 1960) and London, England with 8,222,340 (June 1958). New York World-Telegram and The Sun, The World Almanac and Book of Facts 1961 (hereafter referred to as The World Almanac and Book of Facts, pp. 82 and 396.

23 Contrast 2,002,512 for Philadelphia, Pennsylvania, and 62,810 for Lexington, Kentucky. The World Almanac and Book of Facts, pp. 82 and 89.

on its perimeter, and a fourth of the nation within a 250-mile radius.[24] It is the nation's largest center of finance, trade, manufacture, and commerce. It is the world's largest consumer market. Its port is the most active in the world; each year 26,000 ships, one every twenty-two minutes, enter or leave carrying an estimated $9 billion worth of cargo, or two-fifths by dollar volume, of the maritime trade of the country.[25] The two major metropolitan air terminals annually serve 13,000,000 passengers, handle 800,000 aircraft arrivals and departures, and contribute $66 million in customs duties.[26]

The city is headquarters for nearly 2,000 businesses, each with a net worth of $1 million or more, including 135 of the country's 500 largest industrial corporations and 11 of the 50 largest utilities.[27] Moreover, a vast majority of the remaining industrial leaders, both foreign and domestic, maintain New York offices,[28] and it is home to more trade and business associations than any other American city.[29]

A significant complement of this managerial density is that New York is the nation's largest financial center. It houses the largest of

24 Those counties which besides the five counties of the city (New York, Kings, Queens, Bronx, and Richmond) comprise the metropolitan area (in New York State: Suffolk, Nassau, Westchester, and Rockland; in New Jersey: Essex, Bergen and Hudson), alone account for an additional 5.2 million people, while the population of the entire State of New York is 16.7 million. The World Almanac and Book of Facts, pp. 113-14; Dep't of Commerce, State of New York, This is New York State, pp. 16-17.

25 Over three-quarters of the Port of New York is located in New York City (578 miles of water frontage); the remainder is in New Jersey. The total value of tonnage for 1961 was $9,354,584,000; the exact number of ship movements 26,342. Dep't of Commerce and Industrial Development, City of New York, Statistical Guide for New York City 1962 (hereafter referred to as Statistical Guide), pp. 53 and 55. See 55, No. 3 New York Chamber of Commerce Bull., Oct. 1963, p. 166.

26 Kennedy (New York International) and LaGuardia Airports handled 10,147,056 and 3,292,803 passengers, respectively, in 1961. Statistical Guide, p. 54.

27 Statistical Guide, pp. 72-73. See 55, No. 3 New York Chamber of Commerce Bull., Oct. 1963, pp. 166-67; Federal Reserve Bank of New York, Madden, The Money Side of "The Street," Sept. 1959 (hereafter referred to as Madden, The Money Side of "The Street"), pp. 12-14; Dep't of Commerce, State of New York, Business Fact Book, 1962, Part I (hereafter referred to as Business Fact Book), pp. 1-7.

28 55, No. 3 New York Chamber of Commerce Bull., Oct. 1963, pp. 166-67; Madden, The Money Side of "The Street," p. 13.

29 55, No. 3 New York Chamber of Commerce Bull., Oct. 1963, p. 167.

the nation's twelve regional Reserve banks, six of the nation's ten largest commercial banks, and five of the ten largest insurance companies.[30] Its two stock exchanges trade an annual volume of well above $1.5 million and account for 93% of all securities traded. Expressed in dollars, their volume is overwhelming, no less than $61 billion in 1961.[31] The city's cotton and commodity exchanges, for the same period, acted as clearing houses for $2.2 billion in cotton, wool, rubber, hides, cooper, lead, and zinc.[32]

The city, when examined from the standpoint of its indigenous economic activity, is once again the national champion. The five boroughs contain North America's most expansive and diversified manufacturing community, housing some 35,000 plants engaged in 326 different lines of manufacture.[33] These firms, although most are small by contemporary standards (two-thirds in the 1 to 19 employee category), provide work for almost 900,000 persons. The number so employed is 68% greater than those similarly employed in Chicago and more than three times that in Los Angeles, the next two leading manufacturing cities.[34] The product of their labor is over $7.5 billion each year, and their payroll of over $4 billion rivals the entire foreign aid expenditure.[35] The gross personal income to residents per annum is $2 billion,[36] or 6% of the national total.[37] It is the hub of the wealthiest metropolitan area in the country in terms of personal income. In 1961, the total income of individuals in the metropolitan area was $36.7

30 *Ibid.*

31 Statistical Guide, p. 57; Dep't of Commerce, State of New York, This New York State, p. 34.

32 Statistical Guide, p. 58.

33 Statistical Guide, p. 64; Dep't of Commerce and Public Events, City of New York, *New York—The City that Belongs to the World*, 1956, p. 43.

34 Business Fact Book, p. 6.

35 Total payroll for 1958 of $4,030,354,000 compared to 1960 foreign aid expenditure of $4 billion. Information Please Almanac, Atlas and Yearbook, 1962, p. 589.

36 Contrast $3.75 billion for Philadelphia and $91 million for Lexington. Dep't of Commerce Bureau of Census, County and City Data Book, 1962, pp. 507 and 557.

37 Exact figure $24,503,800. Dep't of Commerce, State of New York, Research Bull. No. 3, Apr. 1962, Personal Income in Counties of New York State 1960, p. 10.

billion.[38] This partially explains why the city's nearly 90,000 retail establishments ring up almost $10 billion in sales annually, exceeding the combined total for Chicago, Philadelphia, and Boston.[39] Yet the sales for the city's 29,000 wholesale establishments are even greater, amounting to over $45 billion.[40] New York is thus the chief market for the nation's consumer and industrial goods.

The city also boasts a service industry doing a volume of $5.3 billion annually, three times that of its closest competitor, and larger than that of any state other than New York.[41] Each year, the city plays host to some 14,000,000 visitors, on business or pleasure, who add $1 billion to the city's sales and services.[42] It is not surprising that the business of managing New York's affairs requires a governmental staff second only in size to that of the United States itself and an expense budget of over $2.7 billion.[43]

The city has long since outgrown its political boundaries and expanded into contigous counties. Adjoining Nassau and Westchester counties are fused to the city. They are virtually a continuation of its factories, stores, apartment houses, and private residences, and with the city constitute a single economic and trading area. Both counties are densely populated, heavily developed, and rapidly growing, largely at the expense of the city. Middle income families have moved into them from the city and have been replaced by families living on a lower, and often subsidized economic scale.[44] Nassau and Westchester now have a population of 1,300,171 and 808,891, respectively, which combined exceeds that of Philadelphia, the fourth largest city in the

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38 The No. 2 metropolis, the Los Angeles-Long Beach area, had individual incomes for 1961 of $16.576 billion, less than half that of New York; Chicago-Evanston, the No. 3 metropolis, $15.4 billion; Philadelphia-Camden, the No. 4 area, $8.9 billion; and Detroit, the fifth largest, $7.5 billion. N.Y. Times Mar. 29, 1964, p. 46.

39 Statistical Guide, p. 65; Business Fact Book, p. 1.

40 Statistical Guide, p. 69.

41 Business Fact Book, p. 3.

42 Statistical Guide, p. 3.

43 *Id.* at 60 and 80.

44 Nadler, The Banking Situation in New York State (1956), p. 11; Report of the Federal Deposits Insurance Corporation (DX8), p. 3.

country.[45] Their combined gross personal income of $8.049 billion is greater per capita than any state in the Union.[46]

Despite the massive scale of the economy of the New York metropolitan area, for the past twenty years the city proper has lagged behind the growth of the rest of the country and the suburban counties. Postwar expansion and decentralization of industry, population growth and shifts, the rise and change in the distribution of wealth and income, and the concomitant growth of other trade and financial centers have made heavy inroads in the economic pre-eminence of the metropolitan area.[47] We think it plain from this glimpse of the size, variety, complexity, pace, and diverse geographical structure of the relevant economy that its elaborate processes would collapse overnight without financial institutions equal to its needs.

B. *The Financial Industry*

It is written that the cornerstone of New York's economic structure was laid over three centuries ago, in 1627, by Peter Minuit when he bartered a few trinkets for all of Manhattan. After that, perhaps because the bargain was transparently suspect, men have used more subtle media of exchange, and money in one form or another has ever since been the lifeblood of the immense economy of the metropolitan area.

History and the community's expanding commerce with the rest of a developing nation and the world have made New York a national and international financial center. Many of the nation's giant financial institutions are located in New York because they had the advantage of an early start and gained momentum with the economic growth of the metropolitan area, the country, and the world.[48] Billions of dollars must move from buyer to seller, from exporter to importer, from

45 Philadelphia has a population of 2,002,512. The World Almanac and Book of Facts, pp. 82, 113-14. The population of either county dwarfs the 131,906 population of Fayette County, Kentucky (*id.* at 109), and the Westchester city of Yonkers alone, with a population of 190,634, is more than three times the size of Lexington and nearly a fifth as large as Philadelphia (*id.* at 82, 89 and 95).

46 U.S. Dep't of Commerce, Survey of Current Business (1963), p. 9.

47 See Nadler, The Banking Situation in New York State (1956), p. 129.

48 Madden, The Money Side of "The Street," p. 12.

lender to borrower, from depositor to banker, or back again, every day.[49] Money must be found in enormous quantities to meet the daily needs of millions of individuals, countless small firms, giant nationwide corporations, governmental bodies, banks, other financial institutions, and a myriad of brokers, dealers, merchants, and industrialists who operate in or through New York's great markets. It takes money in enormous quantities to meet the payrolls of thousands of small business firms and hundreds of giant corporations, pay dividends, finance skyscrapers, pay for cargoes arriving every day from all over the world, carry countless commercial, industrial, and consumer loans, float million dollar blocks of corporate securities, or buy a billion dollars of government obligations in a single day.

The money essential to the smooth workings of this complex and widespread commerce is provided by highly specialized financial institutions, insurance companies, savings and commercial banks, finance companies, factors, investment bankers, pension funds, credit unions, and personal loan companies. All play roles often interrelated, overlapping, and competitive. The volume of business is so great and the pace of transactions so swift that money in the form of coin and currency, like Peter Minuit's trinkets before it, is almost outmoded as a medium of exchange. It has been replaced by a more convenient, simpler, safer, and swifter medium capable of keeping pace with the dizzying velocity of transactions. Today's medium of exchange is checkbook money. It constitutes 80% of the national money supply.[50] Providing it in huge quantities is the unique job of commercial banks.

C. *Commercial Banking, Generally*

Fundamentally, commercial banking is an endless cycle of borrowing and lending. Commercial banks are department stores of finance. They do their borrowing and lending in a variety of forms.[51] Not all

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49 *Id.* at 22.

50 Board of Governors, Federal Reserve System, The Federal Reserve System; Purposes and Functions, Feb. 1961 (hereafter referred to as The Federal Reserve System: Purposes and Functions), pp. 5 et seq.

51 Commercial banks provide many services. They receive savings and other time deposits, as well as demand deposits in the form of regular and special checking accounts; make consumer single payment and installment loans, real estate loans, commercial and industrial loans, agricultural loans, loans to purchase or carry securities, and loans to other banks and other financial institutions; invest substantial amounts in governmental and other securities; provide

commercial banks offer a full range of services. Smaller banks, because of lower lending limits and lack of large and specialized staffs, tend to concentrate on the local needs of local individuals and small businesses. Conversely, some large banks, with greater lending limits, specialization, and organization, focus on the nationwide needs of large corporations. Others deal in large and small units with customers standing in a broad economic spectrum.

Commercial banks, large or small, are the only financial institutions authorized by law to accept demand deposits subject to check. This unique power enables them to create money[52] and sets them apart from

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international banking services, including commercial letters of credit, commercial remittances abroad, and travelers checks; serve as correspondent banks for other domestic commercial banks; serve as trustees under voluntary and court trusts, agency and custody accounts, pension and other employee welfare funds, and corporate securities issues; and act as stock transfer, registrar, dividend disbursement and bond and coupon paying agencies.

52 Individual member banks of the Federal Reserve System are required to hold only a fraction of their deposits as reserves and may loan the balance. If the borrower pays the proceeds of the loan to someone who deposits them in a bank, the process is repeated. Thus, as money cycles from deposit to loan through the banking system as a whole, deposits are generated and credit created on a multiple scale, as is illustrated by the following chart:

MULTIPLY CAPACITY OF RESERVE MONEY IN BANK TRANSACTIONS*

Transactions	Amount Deposited in Checking Accounts	Amount Lent	Amount Set Aside as Reserves
Bank 1	$100.00	$ 80.00	$ 20.00
2	80.00	64.00	16.00
3	64.00	51.20	12.80
4	51.20	40.96	10.24
5	40.96	32.77	8.19
6	32.77	26.22	6.55
7	26.22	20.98	5.24
8	20.98	16.78	4.20
9	16.78	13.42	3.36
10	13.42	10.74	2.68
Total for 10 banks:	$446.33	$357.07	$ 89.26
Additional Banks:	53.67	42.93**	10.74**
Grand Total, All Banks:	$500.00	$400.00	$100.00

*Assuming an average member bank reserve requirement of 20% of demand deposits.

**Adjusted to offset rounding in preceding figures.

The Federal Reserve System: Purposes and Functions, p. 23.

savings banks and other financial institutions. They, therefore, act as reservoirs gathering, expanding, supplying, and, with the help of the Federal Reserve System, clearing checkbook money in huge amounts to meet the economic needs of the community and the country.

When a bank accepts a demand deposit, it borrows money without interest[53] which it pumps back into the economy by honoring the depositor's checks and making loans. The cycle is repeated over and over through the banking system and makes commercial banks the intermediaries in most financial transactions. The importance of this function is evidenced by the fact that in 1958 Americans had 52,000,000 checking accounts, with a total of $110 billion on deposit with commercial banks, and paid an estimated 90% of their bills by check.[54]

The second most important function of commercial banks is supplying short-term credit to individuals, business entities, and the government. Thus, in 1961 commercial banks throughout the country carried a total of about $118 billion in loans.[55] In practice, loans are usually credited to the borrower's account and, therefore, generate corresponding, but volatile, demand deposits.[56].

Commercial banking is subject to comprehensive regulation, state and federal. Entry into the business, branching, and merging are controlled to preserve sound banking, protect depositors, and foster strong, but prevent destructive, competition.[57] Maximum interest rates, with some exceptions, are fixed by state usury laws,[58] and minimum (prime) rates indirectly by the Federal Reserve's regulation of the money supply.[59] Interest on demand deposits is prohibited, and it is regulated on time and savings deposits.[60] Some service charges are free of regu-

53 Member banks of the Federal Reserve System are prohibited by law from paying interest on demand deposits. 12 U.S.C. § 371(a).

54 Madden, The Money Side of "The Street," p. 18.

55 47 Federal Reserve Bull. (1962), p. 314.

56 The Federal Reserve System: Purposes and Functions, pp. 8 and 24.

57 12 U.S.C. §§ 26, 27, 29, 51, 1828(c); 12 C.F.R. § 4.1(b); N.Y. Banking Law §§ 10, 22, 24, 90, 105, 601(b).

58 N.Y. Banking Law § 108.

59 This is accomplished by the Federal Reserve's buying and selling government securities daily and weekly in the open market, and by changes in the discount rates and reserve requirements. 12 U.S.C. §§ 263(c), 353-359, 462, 462(b).

60 N.Y. Banking Law § 14.1(h)(1); 12 U.S.C. §§ 371(a), 371(b).

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lation. Banks are required to submit periodic reports to state and federal banking agencies,[61] submit to examinations whenever the banking authorities deem it necessary,[62] and, if unsound or unsafe practices are found, their charters are subject to summary suspension and even termination.[63] Within these limits, banks are free to set or negotiate the terms and conditions of deposits and loans in competition with their rivals. It is clear, however, that absolute competition in the banking industry is not only inconsistent with, but also in many respects prohibited by, regulatory laws.

D. *Commercial Banking in the Manhattan Area.*

The commercial banking structure of any community mirrors the size, complexity, geographic relationships, tempo, and characteristics of the underlying economy. It is not surprising, therefore, that the size, volume, complexity, variety, tempo, and geographic dispersion of the transactions flowing through commercial banks in the metropolitan area dwarfs that of other communities.

It is hard to realize the immense scale of operations. It is starkly revealed, however, in the fact that 607,000,000 checks worth $624 billion were handled by the New York Federal Reserve Bank in 1958, and on a typical day $2 billion worth of checks cleared through the New York Clearing House, giving New York a volume greater than that of the next 23 largest cities combined.[64]

Part of the flow is generated by the local needs of millions of individuals and thousands of business firms, another part by transactions between outsiders and insiders, still other parts by outsiders and insiders buying and selling through New York's stock and commodity exchanges, by nationwide corporations borrowing, receiving, or disbursing funds, by the Treasury's gathering funds from its borrowings or taxes, or disbursing them from its account at the Federal Reserve banks, by outside banks shifting funds into and out of New York in response to customers' needs or money market pressures, and, finally, by the movement of funds in and out of the area from abroad.[65]

61 N.Y. Banking Law §§ 14.1(m), 37; 12 U.S.C. §§ 161, 324, 1820(e).

62 N.Y. Banking Law §§ 36, 38; 12 U.S.C. §§ 325, 481, 483, 1820(b); 12 C.F.R. § 4.2.

63 12 U.S.C. §§ 301, 1818(a)(b); N.Y. Banking Law §§ 39, 40.

64 Madden, The Money Side of "The Street," pp. 19, 25 and 31.

65 *Id.* at 22 et seq.

Thus, billions of dollars move in and around, and in and out of, the metropolitan area every day in a multitude of banking transactions of infinite variety in size, nature, class of customer, and geographic dispersion. The sheer volume and churning of transactions generates billions in demand deposits, makes the area a traffic center for checkbook money, and creates a vast reservoir of loanable funds. The area banks, therefore, handle an enormous volume and variety of loans ranging from installment loans to local consumers to multimillion dollar loans to nationwide corporations.

As one might expect, the size, volume, pace, and variety of banking services in the metropolitan area has spawned and shaped a commercial banking industry commensurate with the demand for services. There are numerous competitors, great and small, geared to general and specialized banking services in varying degrees.

Thus, at the time of the merger of Manufacturers and Hanover, there were seventy-two commercial banks operating 778 offices in the metropolitan area. They held a total of $37.3 billion in deposits, $20.9 billion in loans, and $44.1 billion in assets. Eight of them held over $1 billion in assets, five others over a half billion, eleven others over $100 million, forty-seven others from $2 to $100 million, and the smallest one $166,000.[66]

With this preliminary look at commercial banking in metropolitan New York, we turn to the place occupied by the parties to this merger.

E. *The Parties to the Merger and Their Place in the Markets.*

Both Manufatcurers and Hanover were New York corporations with their principal place of business in New York City. Manufacturers traces its origin to 1905, and Hanover to 1873. Both were sucessful, well managed,[67] and enjoyed substantial growth. Nevertheless, prior to

66 By way of comparison, forty-two banks in the Philadelphia metropolitan area held $4.3 billion in deposits, $2.7 billion in loans, and $5 billion in assets. See *United States* v. *Philadelphia National Bank,* 201 F. Supp. 348, 355, 363 (E.D. Pa. 1962). Six banks in Fayette County, Kentucky held $146,445,000 in deposits, $88,107,000 in loans, and $163,378,000 in assets. See *United States* v. *First National Bank & Trust Co. of Lexington,* 208 F. Supp. 457, 459-60 (E.D. Ky. 1962).

67 During the period 1956 to 1960, Manufacturers increased its current operating income by 43.9% and averaged $42,000,000 per year in net earnings between 1958 and 1960. During the period 1956 to 1960, Hanover had a 22.7% increase in net operating income and averaged $33,000,000 per year in net earnings between 1958 and 1960.

the merger, their growth rates, as well as that of their largest competitors, lagged those of representative smaller banks in the metropolitan area,[68] as well as those of the nation's 100 largest banks.[69] Hanover had no history of mergers, but Manufacturers had one major merger fifteen years ago[70] and five minor ones during the twenty-year period ending in 1960.

Traditionally Hanover was predominantly, though not entirely, a wholesale bank. It generated most of its business from the deposits and loans of large corporate customers and wealthy individuals. It also served small business firms, but to a very much lesser extent than Manufacturers, and six months before the merger it had ventured into some retail banking services in the local market. It was one of the foremost fiduciary institutions in the city, both in the corporate and personal trust fields. Hanover had 10 branches, and all of them were confined to Manhattan, largely in the uptown business community and in the downtown industrial and financial center. Hanover's operations in the mass retail market were so recent and so small compared to other large integrated banks that the Federal Reserve Board characterized it as a wholesale bank confining its business "almost exclusively to banks and large corporate customers."[72]

Manufacturers, on the other hand, had a tradition of retail banking. Historically its growth was due largely to emphasis on service to smaller customers. Retail business, as we have seen, depends primarily upon convenience of location. Manufacturers, therefore, by 1960 had established the largest branch system in the area, with 120 banking offices spread throughout the five boroughs of the city, where it catered to a mass local market offering a wide range of popular banking services to the general public and small businesses. These included savings accounts, special checking accounts, Christmas Club accounts, gift checks, night depositories, personal loans, automobile loans, education loans, repair and modernization loans, loans on accounts receivable, commodity and industrial equipment financing, and small business

68 DX 40, pp. 8-9; DX 44, p. 3, para. 6; PX 28.

69 DX 1-Memorandum, p. 17.

70 On October 13, 1950 Manufacturers merged with Brooklyn Trust Co. The transaction involved banking assets of $244,069,821.

71 The five minor mergers involved banking assets aggregating $85,792,141, and the last occurred twelve years ago, in 1953.

72 DX 12, p. 2.

loans. In the last fifteen years, Manufacturers also extended its operations into wholesale banking in a nationwide market. The banking agencies, therefore, characterized Manufacturers as primarily a retail bank which was also engaged in wholesale banking.

The complementary nature of the business of the constituent banks is demonstrated by the fact that Hanover had only 44,099 depositors with an average balance of $39,000 compared to Manufacturers' 1,070,606 depositors with an average balance of $3,000. Hanover had only 4,527 borrowers with loans averaging $214,000 compared to Manufacturers' 208,322 borrowers with loans averaging $7,000.

Measured by assets, before the merger Manufacturers was the fifth largest among 70 commercial banks in the metropolitan area and the sixth among 13,484 in the nation, while Hanover ranked eighth in the area and fourteenth in the nation. After the merger, Maufacturers Hanover ranked third in the metropolitan area. Six other banks remained with assets of over $2 billion each. Two of them, Chase Manhattan Bank and First National City Bank of New York, the nation's second and third ranking banks, respectively, are much larger than Manufacturers Hanover.[73] Since the merger, two new banks have opened bringing the number in the area to 72, and three other applications have been approved.[74] Twenty-one of defendant's local competitors, other than the top six, have assets ranging from approximately $100 million to $1 billion, and forty-three more have assets ranging up to approximately $100 million. In addition, under a recent change in New York law[75] permitting foreign banks to open full service branch offices, eleven foreign commercial banks have opened 15 branches in

73 Immediately after the merger, Chase Manhattan held 20.2% of the total assets of commercial banks in the metropolitan area. First National City 17.7%, and Manufacturers Hanover 13.6%. Since the merger, Manufacturers Hanover's share has declined to 11.5%, and the five largest banks from 71.1% to 70.8% (stipulation filed December 10, 1964). Since the merger, the asset, deposit and loan growth of Manufacturers Hanover has not kept pace with that of its smaller competitors (DX 53). Manufacturers Hanover's percentage growth in assets from 1960 to 1961 was 1.9%, and from 1960 to 1962 was 1.6%. In contrast, the percentage growth in assets of its four largest local competitors for the same periods was 11.4% and 17.3%, respectively, for all other metropolitan area banks was 12.3% and 20.0%, respectively, and for all other New York City banks was 12.2% and 17.3%, respectively (DX 53).

74 DX 56.

75 N.Y. Banking Law § 200.

the city. Seven of these foreign banks have assets in excess of $1 billion.[76]

Before the merger, there were 778 banking offices spread throughout the metropolitan area, and there are now 897. Most of them provide a broad range of banking services to the general public, but a few wholesale banks, which publicly spurn the minutia of retail banking or operate only in narrowly specialized fields, remain in the picture.[77] Immediately after the merger, Manufacturers Hanover had 130 branches, and now has 136, but its relative share of offices in the whole local market has declined since the merger from 16.71% to 15.16%.[78]

Since the merger, the number of commercial banks in the nation has increased to 13,569, and, while Manufacturers Hanover now ranks fourth, the Bank of America still remains the largest bank in the country by a wide margin. Moreover, the number of billion dollar banks in the nation has increased from 24 to 31, and there are 169 others with ever-growing assets gradually ranging from $179 million to approximately $1 billion. A cursory comparison of the roster of the nation's 200 largest banks, as of December 31, 1950, December 31, 1960, and December 31, 1963 shows that entry into the top 200 has been, and continues to be, wide open and that numerous banks throughout the country have so increased in relative size during the last fifteen years that they have necessarily entered the national market, and since this merger 13 banks have climbed over their competitors and into the top 200.[79]

F. *The Line of Commerce.*

Much of the evidence presented before the *Philadelphia* decision related to the issue of whether commercial banking is sufficiently dis-

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76 There are no statistics respecting the deposits and loans of the branches opened by the foreign banks.

77 Morgan Guaranty (N.Y. Times, May 12, 1964, p. 15); Bank of New York (DX 42); Belgium American Bank & Trust Co.; and Royal Bank of Canada & Trust Co. (Tr. 246).

78 There are no statistics showing the distribution of branches throughout the metropolitan area either at the time of the merger or since. Our later analysis of branch concentration is, therefore, based on the distribution of branches in the City of New York, and the number of branches considered later differs from the number in the above text.

79 DX 59; DX 61.

tinct from services offered by other types of financial institutions to constitute a distinct line of commerce. That problem has been solved by defendant's concession, inspired, if not compelled, by *United States* v. *Philadelphia National Bank, supra,* that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking'... composes a distinct line of commerce." *Id.,* at 356.

The government, however, contends that certain banking services[80] are subproduct markets requiring separate analysis. "The boundaries of... a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co.* v. *United States, supra,* at 325.

We reject the government's contention because it distorts the true competitive picture, obfuscates analysis, and there is no evidence that any of its selected banking services meet any of the criteria laid down in *Brown Shoe Co.* v. *United States, supra. Cf. United States* v. *E.I. du Pont de Nemours & Co., supra,* at 594.

The purpose of defining the line of commerce is to focus the impact of a merger on competition. *United States* v. *E. I. du Pont de Nemours & Co., supra,* at 592. Competition in banking is the rivalry among banks for customers. Our quest for the relevant line of commerce is, therefore, directed to the point of the merger's impact on customers and other banks.

The evidence shows that commercial banking in the metropolitan area falls into two distinct subproducts—"wholesale" and "retail" accounts. The late Dr. Jules I. Bogen, an acknowledged expert in the

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80 (1) Demand Deposits.
Regular Checking Accounts.
(2) Commercial and Industrial Loans.
(3) Single Payment Loans to Individuals.
(4) Loans to Brokers and Dealers to Purchase and Carry Securities.
(5) Loans to Finance Companies.
(6) Bankers' Acceptances.
(7) Personal and Corporate Trust Services.

banking field, officers of the merged banks, and an officer of a competitor so testified. Their testimony is undisputed. There can be no question that the banking industry, business, and the public regard wholesale and retail banking as a trade reality.[81] All of the banking agencies, and even the Attorney General, acknowledged both lines in their analysis of this merger.

In the parlance of the industry, a wholesale bank is one handling a small number of large accounts, concentrating its efforts primarily on large corporations, governmental bodies, financial institutions, and wealthy individuals, while a retail bank is one handling a large number of small and intermediate accounts, catering to the mass needs of the general public and small business. The economic scale of the customer, size of account, size of the bank, specialized nature of the service, tradition, reputation, and public image determine whether the pattern of a bank's business is wholesale, retail, or wholesale-retail.

Traditionally, many of the large banks located in New York City were wholesale banks. In order to serve their large customers, staffs larger than many fair-sized towns are required. Such banks are department stores of finance, many banks within a bank. They are usually divided into departments by area of the country, by industry, or both. Specialists in a host of industries, products, and markets keep abreast of countless economic and financial details to serve the particular needs of thousands of diversified industries. Skilled research staffs evaluate companies, forecast growth potential, survey market opportunities, plan financing, and program investments.

These banks are also "foreign banks" with overseas offices to assist clients in foreign ventures. They maintain working relationships with foreign correspondent banks, finance exports and imports from all over the world, and are experts in foreign exchange handling billions of foreign funds every year. They keep abreast of the rates of exchange, regulations, and monetary conditions of hundreds of countries. They are also bankers' banks linked to a network of domestic correspondents. Frequently they participate in loans with other or correspondent banks because the credit needs are big or specialized and banks are limited by law in the amount they can loan

81 Madden, The Money Side of "The Street," p. 28. See Business Week, Nov. 17, 1956, p. 51.

to a single borrower,[82] and their overall lending ability is governed by the amount of deposits over reserve requirements.[83]

Another aspect of wholesale banking is the short-term, impersonal, "open market"—the money market proper—where money temporarily idle is loaned in enormous sums for a brief period at a small return. Such funds must be invested and liquidated quickly. The most important assets in which the open market deals, therefore, are federal funds,[84] treasury bills, and other short-term government obligations.[85] Other less important assets include bankers' acceptances, commercial and finance paper, municipal bonds, and short-term government agency obligations.[86] Funds in this open market, aside from Federal Reserve

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82 With certain exceptions related to secured loans, no national bank may loan to any one borrower a sum more than 10% of the bank's unimpaired surplus and paid-in capital stock. 12 U. S. C. § 84. No New York State bank may lend to any one borrower a sum greater than 10% of the aggregate of the bank's capital, surplus, and undivided profits. N. Y. Banking Law § 103.

83 A bank's overall ability to lend is determined by the aggregate amount of its deposits. The law, however, requires that a percentage of deposits be kept as reserves at Federal Reserve banks. These percentages vary according to the member bank's location and are subject to change by the Federal Reserve Board. 12 U. S. C. §§ 462, 462b. The Board, by increasing or decreasing the percentage can effect an industrywide expansion or contraction of credit. The excess of deposits over reserve balances, therefore, measures a bank's credit capacity.

84 Funds deposited with the Federal Reserve Bank in excess of reserve requirements. These are the most liquid of assets as they are transferred merely by immediate adjustment of balances as opposed to Clearing House checks where adjustments are not made until the following day. Banks with an excess of federal funds will lend them at interest to banks with a deficiency for periods as short as a day. The usual unit of trading is $1 million, but as the usual lending limits must be complied with trading is generally limited to the largest banks. Despite the tremendous dollar volume traded, the number of transactions is small, so there is no special market. Stock Exchange brokers and New York City banks themselves act as brokers. It has become the major way for banks to invest temporarily idle cash because it enables a bank to gain interest on money held only a day or two. Madden, The Money Side of "The Street," pp. 42-46.

85 A treasury bill is a bill of exchange drawn on the United States. They are issued weekly by the Treasury and payable in 91 or 182 days, without interest. Profit is the difference between face value and the discount price set by competitive bidding which is centered in the New York area. The popularity of the bill stems from its ability to meet the need for a temporary investment. The interest yield is low, but the investment is safe and quickly liquidable. Madden, The Money Side of "The Street," pp. 47-50.

86 Madden, The Money Side of "The Street," pp. 63-67.

funds, are loaned primarily by commercial banks, business corporations, insurance companies, and foreign central banks. Such funds are in turn borrowed by other commercial banks, the federal government, finance companies, business firms, and others. The two most important institutions in the open market, aside from the Federal Reserve itself, are the big commercial banks[87] and the government security dealers.

The large banks, with their intensive use of money, are like mass production factories compared with the custom tailored lending of the average commercial bank. The nub of the difference stems from the huge accounts and special needs of their corporate customers, their size, lending limits, and organization.

Yet, in other ways, the large integrated banks are like the average small commercial bank. Spurred by a postwar lag in the growth of deposits attributable to non-bank competition, dispersion of industry, population shifts, and the growth of the suburbs, as well as competing financial centers throughout the country,[88] the trend for the past twenty years has been to retail banking. Many former wholesale banks have ventured into retail operations through a network of branches offering a broad range of services to local businesses and the general public. They provide millions of individuals and countless small businesses operating in the local market with check cashing and clearing facilities. They finance the purchase of everything from household furniture to machinery. Their loans make payment possible while materials are being manufactured, stored, or transported in or around the metropolitan area, or sitting on dealers' shelves awaiting sale.

Thus, as a result of its historical development, commercial banking in the metropolitan area involves both wholesale and retail banking in

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87 The big banks have a special problem which pulls them into the open market. The problem arises from the fact that large deposits and withdrawals of correspondent banks, big business firms, and government securities dealers are often unpredictable. This results in fluctuating cash flows and unexpected excesses and deficiencies of funds in large amounts that may last for only a day or two. Excess funds resulting from huge deposits cannot lie idle even for a day without courting disaster. Yet the whole of such deposits may be withdrawn either on demand or on a few days' notice. The banks must, therefore, provide for unexpected drains. The open market, with its safe, but quickly liquidable, investments provides the answer. Madden, The Money Side of "The Street," p. 31 *et seq.*

88 See Nadler, The Banking Situation in New York State (1956), p. 11.

varying degrees. The distinction between the categories is clear under the test laid down in *Brown Shoe Co.* v. *United States, supra,* but the demarcation line between retail and wholesale accounts is fuzzy. That the dividing line is debatable, however, is of no moment. It simply means that workable guidelines must be found in order to sketch a true competitive picture.[89]

The legislative history of Clayton § 7 is permeated with congressional concern for the public and small business.[90] Manifestly, small and intermediate customers are more limited in their choice of a bank and less able to bargain for terms and conditions than large customers with nationwide standing and the economic strength to conduct their banking business in any of the nation's financial centers. The elimination of a banking alternative by a merger is, therefore, more likely to have a direct and immediate impact on the many small and intermediate customers than on the relatively few large ones. The law, however, applies equally to the great and the small.

There is no doubt that this case concerns both wholesale and retail customers and rivalry for their business. We, therefore, recognize both groups as perfectly good lines of commerce[91] and will assess the competitive impact of this merger on both large and small customers and upon all of the commercial banks competing for their patronage in the relevant geographic markets.

G. *The Geographic Markets.*

The parties differ as to the appropriate "section of the country" or relevant geographic market for assessing the probable competitive effect of the merger. The government contends that the primary market is confined to the City of New York but that the metropolitan area and the whole nation are also appropriate markets. Defendant contends that the primary geographic market is not confined to the City of New York but embraces the metropolitan area, and that we should exclude non-area banking business in calculating local market shares.

The main offices and all of the branches of both Manufacturers and Hanover were located within the City of New York. It is clear, however, that they did considerable business with customers located in

89 This will be developed *infra.*

90 H. Rep. No. 1191, 81st Cong., 1st Sess. 13 (1949).

91 *Cf. United States* v. *Philadelphia National Bank, supra,* at 360 n. 37.

the metropolitan area and elsewhere throughout the country and the world. The question to be answered, however, is not where the parties to the merger did business, or even where they competed, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. "This depends upon 'the geographic structure of supplier-customer relations.'" *United States* v. *Philadelphia National Bank, supra,* at 357. That relationship here is complex, chaotic, and elusive. It is plain, however, that it is by no means confined to the City of New York.

The only clear fact emerging from the swamp of statistics and the facts behind them is that the geographic market varies with the geographic ties and the economic scale of the customer, and the size and nature of the banking service. The short of the matter is that the facts do not permit precise definition of the geographic market. Whatever market or markets we choose, therefore, will be somewhat artificial.

Confronted with a similar problem in *Philadelphia,* the Supreme Court taught that we must find a workable compromise which avoids the indefensible extremes of drawing the market either too expansively or too narrowly (374 U. S. at page 361). This means, we take it, that above all else the geographic markets must not be gerrymandered to rationalize theories but defined with fidelity to competitive realities. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." *Brown Shoe Co.* v. *United States, supra,* at 336-37.

The fact that Clayton § 7 speaks of the lessening of competition in "any section of the country" does not, of course, mean that the geographic area in which the competitive effect of the merger is to be measured under the Clayton and Sherman Acts may be defined as small as the government chooses. *Cf. Brown Shoe Co.* v. *United States, supra,* at 367 (Harlan, J., concurring in part and dissenting in part). Rather "the boundaries of the relevant market [or markets] must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Brown Shoe Co.* v. *United States, supra,* at 326. Our quest is directed to the geographic area of effective competi-

tion. That area depends first upon the geographic area in which competitors market the relevant products and second upon where, within the area of competitive overlap, the customer can practicably turn for supplies. *United States* v. *Philadelphia National Bank, supra,* at 359; *Brown Shoe Co.* v. *United States, supra,* at 320 n. 35; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 327 (1961); *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 299 n. 5 (1949).

H. *The Local Market.*

Our search for the local area of effective competition is guided to a workable segment of the market which is segregated from the balance of the market and large enough to be economically significant. *Tampa Electric Co.* v. *Nashville Coal Co., supra,* at 327; *Standard Oil Co. of California* v. *United States, supra,* at 299 n. 5; *United States* v. *Bethlehem Steel Corp., supra,* at 596 n. 42. "In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country. S. Rep. No. 1775, 81st Cong., 2d Sess. 5-6 (1950).

We note at the outset that the Federal Reserve Board did not even discuss the problem, but the New York Superintendent of Banks, the F. D. I. C., and the Comptroller of the Currency, though inexplicit, regarded the local market as coextensive with the metropolitan area. The parties have stipulated that the metropolitan area shall be defined as the City of New York, plus Nassau and Westchester Counties.[92]

There can be no question that banks located in New York City market their services and compete with banks throughout the metropolitan area.[93] City banks aggressively seek the patronage of suburban

92 According to the evidence, the metropolitan area is comprised of the five counties of the City, plus Westchester, Rockland, Nassau, and Suffolk Counties in New York State; Bergen, Essex, and Hudson Counties in New Jersey; and Fairfield County in Connecticut. "The general concept adopted in defining a standard metropolitan area [is] that of an integrated economic area with a large volume of daily travel and communication between a central city of 50,000 inhabitants or more and the outlying parts of the area. . . ." II United States Bureau of the Census, U. S. Census of Business: 1954, p. 3.

93 *Cf.* Annual Report of the F. D. I. C. for the year ended December 31, 1960 (DX 41, p. 3).

residents through all advertising media. Competitive overlap is inherent also in the fact that the city is the hub of a local trading and marketing area which pulls suburban businessmen and some of their banking business into the city.

There is intense rivalry between city and suburban banks for the business of over 200,000 commuters who sleep in the suburbs but spend their days working in the city.[94] Commuters, particularly those with small and intermediate accounts, often find it convenient to bank both where they work and where they live. The fact of effective intermetropolitan competition is demonstrated by evidence that both Manufacturers and Hanover derived considerable business from customers residing outside the city, in the metropolitan area.[95] *Cf. United States v. Philadelphia National Bank, supra,* at 359 n. 36.

The existence of effective competition between city banks and banks located in Nassau and Westchester is confirmed by a 1960 amendment to the New York Banking Law (§ 105.1(b)) which recognizes the city, plus Nassau and Westchester, as a unified banking community and permits cross-branching within the area. Under this legislation, New York City banks had been authorized to open thirty-two branches in Nassau or Westchester through the end of 1962. At least two large Nassau banks have now branched into the city, and more applications are pending.[96]

The foregoing facts show that New York City commercial banks are in direct and effective competition with the banks of Nassau and

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94 Nassau has a population of 1,300,171, a worker force of 467,233, and 182,669 or 39% are employed in the city. Westchester has a population of 808,891, a worker force of 323,026, and 84,669 or 26% are employed in the city. Dep't of Commerce, Bureau of Census, 1960 Census Tracts 150, 152.

95 The parties have stipulated (PX 14) that 75% of Manufacturers and Hanover's borrowers and depositors in five categories of banking services are located in the city and the other 25% in Nassau and Westchester Counties. The five categories are: IPC regular checking accounts; commercial and industrial loans $100,000 and under in size; all special checking accounts; all savings accounts, including Christmas Club accounts; and single payment loans to individuals $25,000 and under in size.

96 See New York State Banking Dep't, Branch Banking, Bank Mergers and the Public Interest (Jan. 1964), pp. 38-39. We have no evidence showing how much of the business of Westchester and Nassau banks without branch offices in the city originates from customers located in the city, but we note that the number of reverse commuters and city businesses with suburban branches is steadily increasing with the expanding economies of those counties.

Westchester counties. Moreover, the population shift to the suburbs and the growth of suburban banks create a continual threat of even greater cross-branching thereby intensifying the effect of potential intermetropolitan competition. *Cf. United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158, 173 (1964).

The problem of defining the local geographic market is thus reduced to whether customers can practicably turn to banks within the metropolitan area for their banking needs. The evidence shows that most individuals depend upon banks in the immediate neighborhood of their home or place of work because their resources are small, their banking needs limited, and it is neither necessary nor convenient for them to bank elsewhere. Small and intermediate business enterprises tend to do business in a broader area, but within their own region, because they are known there and limited resources, local needs, and convenience tend to localize their banking alternatives. *Cf. United States* v. *Philadelphia National Bank, supra,* at 358-59 nn. 35 & 36.

These practicable restrictions on retail customers also orient retail banking, which caters to the general public, to the area where the bank is located and operate to insulate such banks from actual and potential competition from outside banks for retail accounts.[97] As a result, the metropolitan area is largely segregated from, independent of, and not affected by commerce in retail banking in other parts of the country. See S. Rep. No. 1775, 81st Cong., 2d Sess. 5-6 (1950). The evidence shows, however, that as customers grow from intermediate to large, from local to nationally-known concerns, from single to multiple geographic locations, the factor of inconvenience diminishes to a point where it ceases to localize the customers banking alternatives and no longer walls off outside competitors.

The purpose of defining geographic markets is to bring the competitive picture into clear focus. *Cf. United States* v. *Continental Can Co.,* 378 U. S. 441 (1964). Our search for a clear picture of the local market is thus directed not to the smallest or largest possible geographic area, but to the smallest workable area of effective competition. That area, we think, is the smallest separate competitive arena big enough to accommodate most of the customers. The metropolitan area

97 As we shall see, the evidence shows that most of the business done by local banks outside the metropolitan area, and by outside banks within the area, is with large borrowers and large depositors. *Cf. United States* v. *Philadelphia National Bank, supra,* at 358-360, nn. 35, 36 & 37.

unmistakably meets the specifications for, as we shall later develop, 99.74% of Manufacturers' depositors and 96.77% of its borrowers were retail customers located within the metropolitan area, insulated from outside competitors, actual and potential, and unable as a practical matter to bank elsewhere. The corresponding percentages for Hanover are 94.59% and 67.39%.[98]

The foregoing facts clearly segregate the metropolitan area from the rest of the nation as an economically significant market and roughly delineate the local area of effective competition. *United States* v. *Philadelphia National Bank, supra,* at 359-61. See S. Rep. No. 1775, 81st Cong., 2d Sess. 5-6 (1950).

Accordingly, we find that the metropolitan area is a more appropriate and workable segment of the market for separate analysis of the competitive effect of this merger than any smaller section of the country. Our problem is not ended, however, for there is no dispute that the merging banks also operated in a national market.

I. *The National Market.*

The government claims that the merger is violative of the antitrust laws not only in the local market but also in the United States.[99]

98 See Appendix A.

99 The complaint alleges that the merger will have proscribed anticompetitive effects "in the New York City area" (para. 19). It also alleges that: "Customers of Manufacturers and Hanover have regularly utilized interstate communications, including the mails, telephone and telegraph, to effect deposits, apply for and obtain other services made available by these banks. The banks have regularly utilized interstate communications, including the mails, telephone and telegraph, to conduct banking business with customers, and with other banks located in states other than the state in which they are located. The banks have received a substantial amount of deposits from states other than the state in which they are located, and have made a substantial amount of loans to customers in such other states." (Para. 14.) The complaint was not amended, but the case was tried on the issue of whether the merger offends the antitrust laws "in New York City, the metropolitan area, and the United States." (Plaintiff's Statement of Contentions.)

Defendant claims neither prejudice nor lack of fair notice of the full breadth of the government's claim, and, indeed, in its answer admits that it competed with banks and others not only "in the New York City area" but also throughout the nation with respect to certain commercial banking functions (Answer, para. 9). The only purpose of a complaint under the Federal Rules is to give fair notice of a claim (Fed. R. Civ. P. 8; *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957)). The government's broad claim is fairly embraced within the framework of the parties' practical construction of the pleadings, and we must, therefore, deal with it on the merits.

The evidence overwhelmingly establishes, and, indeed, there is no dispute that Manufacturers and Hanover, along with other leading metropolitan banks, in addition to local business, also received substantial deposits from sources outside the metropolitan area, made substantial loans to borrowers located in other states and in foreign countries, and conducted a variety of banking business with bankers and representatives located throughout the country and the world.[100] Likewise there is no question that large banks located throughout the country compete in a nationwide area for the patronage of large customers located throughout the country. Such customers regularly use the mails, telephone, and telegraph to effect deposits, apply for and obtain loans, and carry out other banking transactions.

All of the banking agencies and the Attorney General, therefore, found that the merging banks and their large metropolitan competitors operated in both a local and a national market. We agree. Thus, unlike *Philadelphia* or *Lexington*, we are confronted with two geographic markets and the problem of separating one from the other in order to ascertain the true competitive structure of each.

The government bears the burden of proving its claim that the merger has the proscribed anticompetitive effects in either or both of the geographic markets. Definition of the geographic markets and proof of the competitive structure of each of them lie at the very threshold of the government's burden of proof for "proper definition of the market is a 'necessary predicate' to an examination of the competition that may be affected by the horizontal aspects of the merger" (*Brown Shoe Co.* v. *United States, supra,* at 335), and a sound appraisal of the immediate and future impact of this merger on competition must be based on "a firm understanding of the structure of the relevant market" (*United States* v. *Philadelphia National Bank, supra,* at 362). The government, however, makes no attempt to separate the local from the national market, nor to define the competitive structure of either. Rather it commingles the geographic markets in reliance on a contention that New York City should be considered separate and apart from the rest of the country in appraising the competitive effect of this merger.

100 The complaint does not charge violation of the antitrust laws in foreign commerce, and, in any event, the evidence is wholly insufficient to enable us separately to define the international market or to ascertain its structure in order to assess the competitive effect of the merger on foreign commerce.

We have already found that the area of effective competition for retail accounts is not confined to the City but embraces the metropolitan area. All that remains for our consideration, therefore, is whether the geographic area of effective competition for so-called "wholesale accounts" is nationwide or confined to New York City.

The government's contention is based on the thesis that New York City is the nation's financial center and that the demand for large busiless loans "centers on" New York's billion dollar banks because interest rates are lower [101] and the banking needs of wholesale customers can be served adequately only by big banks. Therefore: (1) wholesale customers located entirely outside the metropolitan area tend to place their loans in New York; (2) wholesale customers located entirely inside the metropolitan area have easy access to the big banks of the nation's financial center and find it unnecessary, impracticable, and inconvenient to go elsewhere for their credit needs; and (3) wholesale customers with an office[102] in the metropolitan area, but with plants and facilities elsewhere throughout the country, have easy access to the big banks of New York City and find it unnecessary, impracticable, and inconvenient to go elsewhere for their banking needs, regardless of their national standing, economic strength, or nationwide connections, operations, or commerce.

Defendant contends that the area of effective competition for wholesale accounts is not confined to New York City but embraces the nation because wholesale customers are the cream of the banking busi-

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	All Loans	*Size of Loans (thousands of dollars)* 1-10	10-100	100-200	200 and over
New York City	4.75%	5.65%	5.36%	5.06%	4.64%
7 Other Northern and Eastern Cities	5.05	5.86	5.53	5.18	4.93
11 Southern and Western Cities	5.26	5.97	[illegible]	[illegible]	5.04

Source: DX 40, p. 7.

102 Some of the government's proposed findings are pegged to "principal office," others to customers "located in New York City," and still others to a "Treasurer's office or other executive office in New York." There is no evidence beyond such bare description as to the activities of any such offices. We find that the only workable approach is one classification for all companies with multiple geographic locations.

ness, and large banks of all the nation's many financial centers aggressively compete with each other throughout the country for the patronage of wholesale customers regardless of the location of the bank or the customer. Moreover, defendant argues, wholesale customers are not restricted to their own locality for their banking needs but can, and do, turn to many competing financial centers throughout the country for banking services. Such customers, according to defendant, have the economic strength, national standing, and nationwide geographic connections which enable them to bank in a nationwide area and find it necessary, practicable, and convenient to do so.

In support of its contention, the government first points to testimony that wholesale customers can be served adequately only by large banks and to evidence that the concentration of large business, financial, and government fiscal activities in New York has made it the traditional financial center of the nation.[103] There can be no question that New York City is the nation's leading financial center, and there is no dispute that wholesale customers require the services of large banks. Nor can there be any question that New York's big banks, like big banks everywhere, owe their existence to the massive banking needs of a big population, big business, big financial institutions, and big government. It by no means follows, however, that New York City is the nation's only financial center or that the area of effective competition for the accounts of wholesale customers is confined to New York City.

The government claims that surveys of the Federal Reserve Board prove that the demand for large business loans "centers on" New York. One survey, of 1955 vintage, shows the distribution of business loans throughout the nation's twelve Federal Reserve Districts. It does not segregate the share of business loans held by New York City banks but shows the aggregate share of all banks within the much larger Second Federal Reserve District. Even if we overlook the discrepency in geographic areas,[104] the survey more refutes than confirms the gov-

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103 *Cf.* Madden, The Money Side of "The Street," p. 30.

104 We note that the Second District covers the whole State of New York and the northern half of New Jersey and, exclusive of many other big cities, four of the nation's largest metropolitan areas other than New York: Buffalo; Albany-Schenectady-Troy; Newark; and Paterson-Clifton-Passaic. The Federal Reserve System: Purposes and Functions, p. 67; The World Almanac and Book of Facts, pp. 82, 396.

ernment's thesis for it would still show that New York held only 20% of the customers, and 33% of the amount, of the nation's business loans, and that banks located elsewhere throughout the country held the rest. Although New York's share would be larger than any other single financial center and progressively increase with the size of the loans, banks elsewhere throughout the country would hold a greater share than New York of all business loans up to $5,000,000 and one-third of the loans in the highest bracket—$5,000,000 and over.[105]

An economist of the Department of Justice avers that New York's share of large business loans has not changed in the past nine years. If so, the geographic area of effective competition, actual and potential, for such loans is clearly nationwide both in terms of competitors and customer alternatives. We think, however, that the government's affiant overlooks material facts which show that the historical imbalance between New York and the rest of the country in the supply of, and demand for, money is largely a relic of a bygone age, and that New York is confronted with more extensive and powerful nationwide competition now than it was ten years ago.

We take notice that New York City has not kept pace with the population and economic growth of other areas of the country.[106] We note also that growth elsewhere has caused expansion of the nation's banking system and bred other giant financial centers. Thus, in 1958, when Congress was studying the need for legislation to regulate bank

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105 *Geographic Distribution of Business Loans*

	Second District's Share	
Bracket	*Customers*	*Amount*
$10,000 to $25,000	17.8%	17.8%
$25,000 to $50,000	18.5	18.7
$50,000 to $100,000	18.7	19.3
$100,000 to $500,000	23.0	23.9
$500,000 to $1,000,000	30.6	30.5
$1,000,000 to $5,000,000	42.9	45.2
$5,000,000 and over	63.8	66.7

PX 2.

106 The population of the New York metropolitan area increased by 13.2% in the decade 1950-60, which equalled the growth for the Northeast, but lagged that of the West with 38.9%, the North Central with 16.1%, the South with 16.5%, and the country as a whole with 18.5%. The World Almanac and Book of Facts, p. 81.

mergers, there were 13,540 commercial banks in the United States,[107] but by the end of 1963 the number of banks had increased to 13,569.[108]

These facts indicate that the Bank Merger Act and the nation's growth have combined to preserve and increase the number of viable commercial banking alternatives throughout the country. Thus, the notion that there is no room for newcomers and that ample nationwide banking alternatives are about to disappear would seem to be more the product of myth than fact.[109]

Nationwide competition for large business loans cannot be measured, however, merely by counting the number of banks. Our search is for the area of *effective* competition for wholesale accounts, the relevant product. We are concerned, therefore, less with the number of banks than with the number of effective competitors for wholesale accounts and the vigor, intensity, and power of competition. *United States* v. *Penn-Olin Chemical Co., supra,* at 177; *Tampa Electric Co.* v. *Nashville Coal Co., supra,* at 329; *United States* v. *Columbia Steel Co., supra,* at 527-28.

The evidence shows that there is a direct relationship between the size of a bank and its ability to attract, serve, and keep wholesale customers. As a practical matter, small banks are not effective competitors for wholesale accounts.[110] A bank, for proper reasons of diffusion of risk, seldom wishes to loan the full amount of its legal lending limit to one borrower. Conversely, a large borrower seldom wishes to confine his loans to one bank with a small lending limit because such a bank cannot meet his expanding or emergency credit needs.

Smaller banks may be able to accommodate large borrowers by participation loans with other banks, or by the borrower's maintaining multiple lines of credit. Wholesale loans or lines of credit are, therefore, often made under complex and cumbersome participation arrangements to which a number of banks are parties. Participation arrange-

107 Hearing on Regulation of a Bank Mergers Before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. 181 (1959).

108 Fiftieth Annual Report of the Board of Governors of the Federal Reserve System Covering Operations for the Year Ended December 31, 1963, p. 234 (DX 60).

109 We notice that "this year more than 300 banks will get started, almost three times more than in 1961." Time Magazine, Aug. 28, 1964, p. 74.

110 DX 49, pp. 403-405. *Cf. United States* v. *Philadelphia National Bank, supra,* at 364 n. 40 (3) & 368 n. 45.

ments, however, are inconvenient and disadvantageous to a large borrower for they involve multiple credit appraisals, notes, and notifications, and the borrower loses the benefit of negotiating with more than one bank. The negotiations are conducted by the lead bank, and there is no competitive interchange either between the participant banks and the customer, or among the participating banks. The climate is, therefore, essentially non-competitive (DX 10).

Most large business loans are made by large banks simply because their legal lending limits and uncommitted funds over required reserve balances are greater than their smaller competitors. Large banks, with more money, wider diffusion of risk, and greater specialization are also better able, and more prone, to take the risk involved in large loans. They can also meet the borrower's expanding needs and handle the transaction with much less inconvenience to the borrower. Moreover, with greater resources and wider relationships, large banks are more able to operate beyond their own locality. Finally, the borrower has the competitive advantage of playing one large bank against another in negotiating terms. Large banks are, thus, essential to serve the massive credit needs of an expanding population, industry, commerce, and government,[111] and, although large customers borrow much more from non-bank sources than from banks, big banks are still an important source of short-term credit required for working capital.

These factors explain why throughout the country banks with deposits of $100 million or more account for about 95% of the loans to large borrowers.[112] The relationship of size of loan to size of bank, as well as the mobility of larger borrowers, is also shown in a 1957 survey of the Federal Reserve Board (PX 2). The survey shows that smaller New York City banks derived only 14% of the amount and 10% of the number of their business loans from customers located outside New York City, while the city's billion dollar banks derived more than half the amount and 20% of the number of their business loans from outside customers and accounted for 90% of the dollar

111 "[A]n important financial center like New York serves a function of providing wholesale banking in the form of large business credits for national and international enterprises. Such loans, which become bank assets, are attracted only by the adequacy of the institutions from a size standpoint to furnish the credit either by themselves or in association with other large financial institutions." Recent Bank Mergers in New York City, A Report by the New York State Banking Department, June 8, 1955, p. 12.

112 DX 49, p. 404; DX 40, pp. 3, 10; DX 48, p. 331.

amount of loans by Second District banks to borrowers with assets of $100 million or more.

New York, however, is not the only city with big banks, and, although it still retains the leading position among the nation's credit markets, the gap between it and other financial centers is rapidly shrinking. Banks throughout the country, in response to postwar changes in the geographic and social distribution of wealth[113] and the dispersion and growth of population and business, have increased in size and extended the area of their operations beyond their own localities. These normal competitive and decentralizing forces have resulted in a steady decline in the proportion of resources held by banks in New York City and an increase in the proportion held by banks located elsewhere.[114]

We notice that in 1940 the three largest commercial banks in the nation were located in New York City. The Bank of America, located in California, then ranked fourth, but by 1947 it had passed over all the New York banks and has ever since held the lead. It gained a phenomenal 584% increase in deposits from 1940 to 1957.[115] The Bank of America climbed to the top as a retail bank. It has 846 branches sprawled throughout California, from Oregon to Mexico, more

113 The flight of business and middle income population from the city continues apace. N. Y. Herald Tribune, Jan. 25, 1965, p. 1, col. 2.

114 Federal Reserve Bank of New York, Monthly Review, Vol. 42, June 1960, p. 98; Recent Bank Mergers in New York City, *supra*, pp. 31-32:

Relative Growth in Total Deposits of Member Banks
New York City and Other Large Cities
1946-54

	Total Deposits		*Increase*	
	12/31/46	*12/29/54*		
	(Amounts in Millions)		*Amount*	*Percent*
New York City*	$24,723	$28,233	$ 3,510	14.2%
Chicago*	5,905	7,742	1,837	31.1
Reserve city member banks	44,477	60,889	16,412	36.9
Total—outside New York City	$50,382	$68,631	$18,249	36.2%

* Central reserve city members only.
Source: Recent Bank Mergers in New York City, *supra*, p. 32.

115 Report of the Special Deposit Study Committee of the New York Clearing House, Sept. 25, 1959, pp. 51-65.

branches, incidentally, than all of the banks of the New York metropolitan area combined.

While New York's once staid wholesale banks began welcoming retail customers to bolster lagging deposit growth,[116] the Bank of America entered the wholesale market to relieve its bulging vaults. As California companies began buying and selling nationally and internationally, and as companies elsewhere began buying and selling in California, the bank followed them and extended its operations beyond California into the national and international areas. The fact that a bank among those most remote from New York City effectively competes for wholesale accounts, regardless of the customer's geographic location, is clear from the Bank of America's boast that it now has "more of the top 100 corporations as customers than any other bank."[117] The story has its counterparts throughout the country, though some states have a unit banking system which inhibits growth, and others, such as California and New York, permit statewide or limited branching which promote growth.

In 1950 there were 18 commercial banks in the United States with deposits of $1 billion or more, and 9 of them were located outside New York City.[118] By 1960, the year of this merger, the number of such banks had increased to 22, while the number outside New York City increased to 14.[119] Since this merger, the number of such banks has grown to 31, and 24 of them are located outside the City of New York.

Thus, in the last thirteen years, the number of million dollar banks outside New York has almost tripled. As a result, there are now one or more billion dollar banks located in San Francisco, Los Angeles, Seattle, Portland (Oregon), Dallas, Chicago, Detroit, Cleveland, Buffalo, Pittsburgh, Philadelphia, Boston, and Mineola.[120] Manifestly banks are flourishing and entry into the billion dollar class is wide open

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116 Madden, The Money Side of "The Street," p. 28. The proportion of loan volume of banks with deposits of $1 million or more to businesses with assets of $5 million and over declined substantially between 1946 and 1955. DX 48, p. 331.

117 N. Y. Times, Dec. 9, 1963, p. 57, col. 3. Competition with New York banks is apparent from Morgan Guaranty Trust Company's boast that "96 of America's 100 largest corporations" also bank with it. N. Y. Times, may 12, 1964, p. 15.

118 DX 59.

119 DX 61.

120 DX 61.

in every region of the country.[121] In addition there are 43 other outside banks pushing for admission into the billion dollar class with deposits ranging from $500 million to $987 million, and 125 more with deposits from $179 million to $496 million. These facts overwhelmingly support the F. D. I. C.'s observation that:

> **"For large business concerns it seems quite probable that there has been an increase during the past 40 years in the competition among banks for their business. That is to say, *the larger banks, mostly located in large cities, compete with each other for the patronage of concerns doing a nationwide business.* With the greatly increased facilities of transportation and communication of recent years, there is more competition of this sort now than formerly, regardless of the changes which have occurred in the number of banks or the number and location of banking offices." Annual Report of the F. D. I. C. for the Year Ended December 31, 1960, p. 60. (Emphasis added.)[122]**

121 Yet banks throughout the nation have not kept pace with the growth of their large corporate borrowers. Since 1949 the assets of the 100 largest corporations have increased 145.2% while the assets of the 100 largest banks have increased only 72.4%. DX 1-Memorandum, p. 17; Recent Bank Mergers in New York City, *supra*, pp. 30-31; Fortune Magazine, July 1960, p. 131; Moody's Industrial Manual, 1960; *100 Largest Banks in the United States.* American Banker, Jan. 29, 1960, p. 53; Moody's Bank and Finance Manual, 1950.

122 Compare *United States* v. *Philadelphia National Bank, supra,* at 359 n.36: "The evidence discloses that most of the business done outside the [Philadelphia] area is with large borrowers and large depositors;" at 360 n.37: "[C]ompetition from outside the area would only be important to the larger borrowers and depositors." and at 368 n.45:

> "'Q. In what area does competition exist? . . . A. I think the stiffest, sternest competition of all is in the field to obtain demand deposits and loans. . . .
>
> 'Q. What form does the competition take? A. It takes many forms. *If we are dealing with the deposits of large corporations, wealthy individuals, I would say that most, if not all, of the major banks of the country are competing for such deposits. The same would hold true as regards loans to those corporations or wealthy individuals.*
>
> 'If we go into the field of smaller loans, smaller deposits, the competition is more regional—wide but nevertheless regional—and there the large banks as well as the small banks are after that business with everything they have.'" (Emphasis added.)

Compare also *United States* v. *First National Bank & Trust Co. of Lexington, supra,* at 668: "Apart from large national companies, businesses in the area are restricted to Fayette County banks for their working capital loans. . . ."

Indeed, the number of nationwide competitors is so great, and the vigor of competition for wholesale accounts so intense, that it has forced large New York City banks to charge lower interest rates on loans and to suffer a lower ratio of net earnings to capital than banks located in other areas in order to remain competitive.[123]

That outside competition has an effective influence on New York, and vice versa, is further demonstrated by evidence that all changes in the prime interest rate since 1947 and all reductions, without exception, have been initiated by New York banks, the last by Manufacturers in 1960.[124] Nevertheless, New York's big banks have not kept pace with the growth of their big outside competitors.[125] Indeed, prior to the merger, both Manufacturers and Hanover lagged behind the growth of the country's 100 largest banks.[126] The large outside banks prove the existence of effective nationwide competition and the sensitivity

123 PX 2, p. 9; DX 40, p. 7.

124 PX 20, p. 12. We notice that recent increases in the prime rate, in the wake of the increase in the British bank rate and the Federal Reserve Board's increase in the discount rate, were neither initiated nor followed by New York banks. N.Y. Times, Nov. 29, 1964, § 3, p. F-1, col. 5.

125 "Although New York City holds by a wide margin its position as the banking capital of the United States, it has suffered relative loss of ground in that deposit growth here, in recent years, has lagged behind that in other parts of the country." Report of the Special Deposit Study Committee of the New York Clearing House, Sept. 25, 1959, p. 1. This conclusion was recently confirmed by the Federal Reserve Bank of New York in the following terms: "A number of New York City banks felt that, despite their unique ability to attract nationwide customers, the long-term prospects facing them were unpromising. The financial center's share in the nation-wide bank deposits has been declining. From the outset of World War II through the end of 1959, deposits of all commercial banks tripled, increasing from approximately $71 billion to $216 billion. By contrast, deposits of the large downtown banks of New York City expanded only 67 per cent, from $18 billion to $30 billion, and most of this increase occurred during the war. As a corollary of the disparate rates of expansion, the share of the New York central reserve city banks in the deposits of all commercial banks declined from 25.4 per cent to 13.9 per cent between 1941 and 1959. The virtual absence of any growth of deposits at the City banks in the postwar period has raised doubts concerning the long-run ability of the New York City banks to keep pace with the rising credit needs of their traditional customers, the nation's largest corporations." Federal Reserve Bank of New York, Monthly Review, Vol. 42, June 1960, p. 98.

126 The assets of the nation's 100 largest banks have increased 72.4% since 1949, while in the case of Hanover the increase for the same period was only 14.5% and for Manufacturers it was 27.7%. DX 1-Memorandum, p. 17.

of the nationwide market to what happens in New York by meeting the prime rate, which tends to set the level for all rates, and remaining competitive without initiating reductions. As a result, large borrowers can obtain the same rate from large banks throughout the country.[127] It seems clear that regional credit markets are interrelated, that large sophisticated borrowers and depositors shop around, and that competitive changes in one region have a direct and immediate impact in the others. In short, money has no home but, spurred by the urge to propogate, ebbs and flows from one area to another in response to opportunities for greater yield. The interrelationship of the nation's credit markets is explained in a recent publication of the Federal Reserve Board:

> "Credit markets . . . are . . . closely linked through the activities of borrowers, lenders, and investors. As these groups seek the most favorable opportunities for borrowing or for investment of available funds, they may find it advantageous to move from one market to another.
>
> "*From a geographical standpoint, the national credit market is made up of a large number of regional and local credit markets. The rate of interest charged and other conditions in these regional or local markets may vary, but these rates and markets are nonetheless related through conditions affecting both the supply of and demand for credit.*"[128]

Thus, the evidence establishes that there are numerous large and growing banks spread throughout every region of the country and that they operate and compete, actually and potentially, outside their own locality, in a nation-wide area, for the accounts of large customers. Indeed, many of them have offices in New York City. Plainly the banks competing effectively for such accounts are not confined to New York,

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127 Bank Stock Quarterly, June 1961, p. 11 et seq. (PX 20); Bogen (Tr. 280).

128 The Federal Reserve System: Purposes and Functions, pp. 88-89 (emphasis added). "Geographically separated markets maintain contact with one another in a variety of ways: through the correspondent relations of local banks with banks in other markets; through local contacts with large savings and financial institutions, whose operations may be either regional or national; through arrangements between local dealers in investment securities and either the underwriting houses or stock exchange members of the financial centers; and through the facilities of the Federal Reserve System." *Ibid.*

but are located throughout the country in many thriving and interrelated financial centers. We conclude, therefore, that the government's basic premise that banks do not compete outside their own locality and that effective competition for wholesale accounts is confined to banks located in New York City is outdated and unsupported by contemporary facts.

As we have seen, however, definition of the geographic boundaries of a relevant market depends not only upon the area where the parties to the merger and their competitors operate and compete, but also upon the area to which customers "*can practicably turn for supplies*" and the place "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States* v. *Philadelphia National Bank, supra,* at 357-59.

The banking agencies and defendant's experts advise that large borrowers do turn to a nationwide market for bank credit. According to the Federal Reserve Board:

> "While local markets handle most of the relatively small loans originating from local needs and based on local conditions, regionally or nationally known concerns, whose borrowings involve large sums, obtain most of their credit in a broader, even nationwide market. The changing allocation of their borrowing demand, region by region, in response to changing financial conditions helps keep interest rates in fairly close alignment.
>
> "In such ways geographically separated markets are linked in a broad national market. If lendable funds are scarce and costly in one center, the local supply will tend to be augmented by an inflow from centers where funds are more abundant and less costly. As a result, well established borrowers with a high credit rating can obtain loans from banks or others, on much the same conditions in one city as in another. There are many regional credit centers—such as Chicago, Boston, San Francisco—but the largest share of the nation's credit and money market business is transacted in or through New York City."[129]

The banking agencies, particularly the New York Superintendent and the F.D.I.C., also inform us that there are a considerable number of commercial banks aggressively competing for deposits, both locally

129 The Federal Reserve System: Purposes and Functions, pp. 88-89.

and nationally, that the market for large deposits is national "to a considerable degree," and that large depositors do have nationwide deposit alternatives. Defendant's experts testified to the same effect, and there is no evidence to the contrary. As we have seen, deposits constitute the major source of a bank's working capital. Self-interest thus impels banks to seek all the deposits they can get. In effect, banks "buy" deposits but "sell" loans. Depositors are thus in a sellers' market.

We notice that in 1955 the New York State Banking Department investigated the types of business done by large commercial banks in New York City. It investigated their customers, the location of their plants and offices, their banking habits, and their financial practices. The department concluded that "the customers of the large banks in New York City were, for the predominant part, national corporations. Their factories and offices were located in every state of the Union. Their cash balances were distributed among banks all over the country, especially in other financial centers which competed vigorously with Manhattan for a greater share of deposits and credit lines."[130] That conclusion is fully supported by the evidence presented here, as we shall see.

The placement of large demand deposits, however, is predicated, according to the F.D.I.C. and defendant's experts, on lending accommodations, and, according to the Federal Reserve Board, loans are the primary source of demand deposits because in practice loans are credited, at least temporarily, to the borrower's deposit account.[131] Moreover, large loans are often conditioned upon the borrower's maintaining compensating balances. This interrelationship between large loans and large deposits indicates that the area of effective competition is the same for both.

Defendant relies heavily upon its experts and the opinions of the banking agencies in support of its contention that the relevant geographic market for wholesale accounts is nationwide. The banking agencies' publications support defendant's contention, but their reports on this merger conclude that the relevant geographic market for certain wholesale accounts is partly local and partly national. That

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130 Recent Bank Mergers in New York City, *supra*, p. 12.

131 See DX 8, p. 7; DX 19, p. 9; The Federal Reserve System: Purposes and Functions, p. 24.

conclusion, we think, is understandable, but erroneous as a matter of law.

In the applications before the banking agencies, received here either as stipulated facts or expert testimony,[132] the applicant, focusing not on the geographic area of effective competition, but upon the fact that banks located inside and outside the metropolitan area competed for wholesale customers located both inside and outside the area, mistakenly claimed, as it still does in its analysis of each category of the accounts of the constituent banks, that the relevant geographic market for certain types of wholesale accounts[133] is partly local and partly national. The Attorney General, in his report to the Federal Reserve Board, took the same equivocal position for the same erroneous reasons. The federal banking agencies, misguided, agreed. Neither the applicant, nor the Attorney General, nor the banking agencies separated what they conceived to be the local part of wholesale accounts from the national part. Rather, all commingle the product and geographic markets, and both parties repeat that root error here.

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132 All of the facts presented to the Board (DX 1 through DX 6, inclusive, and DX 10) and to the Superintendent (DX 13 through DX 33, inclusive) are, by stipulation, part of the record in this case (DX 39). Substantial portions of the contents of those exhibits [those portions which have not been underscored] were stipulated by the parties to be true and correct (DX 39, paras. 39 and 40). The entire remaining portions of said exhibits [the underscored portions] were, by stipulation, received in evidence as part of defendant's case, with the same force and effect as if the contents had been testified to on direct examination by expert witnesses called by defendant, subject to the right of plaintiff to cross-examine expert witnesses produced by defendant (DX 39, para. 41). Defendant produced Dr. Gabriel Hauge, then vice chairman of the board of directors of Manufacturers Hanover and now its president, both an economist and a banker, with previous experience with the New York State Banking Department and the Federal Reserve Board, for such cross-examination (Tr. 445). The government did not cross-examine Dr. Hauge with respect to the underscored portions of DX 1 through DX 6, inclusive, DX 10, and DX 13 through DX 33, inclusive, except with respect to pages 2, 9 and 16 of DX 1, and page 9 of the Memorandum to DX 1 (Tr. 452-518).

133 DX 1-Memorandum, p. 20, Table 5; DX 13-Memorandum, p. 21, Table 5, Items: 1(e) Demand Deposits over $100,000; 2(e) Commercial and Industrial Loans to Larger Business Borrowers (over $100,000); 2(f) Loans to Brokers and Dealers to Purchase or Carry Securities; 3(a) International Banking Credit Accommodations and Other Services; 4(c) Trusteeships for Pension and Profit-Sharing Plans; 5(a) Trusteeships for Securities Issues; 5(d) Dividend Disbursing Agencies; and 5(e) Bond and Coupon Paying Agencies.

We, of course, are not bound by the parties' claims, nor the opinions of defendant's banking experts, nor those of the Attorney General, nor of the banking agencies respecting the relevant geographic markets. Definition of the market is a typical antitrust problem which requires not the expertness of bankers, economists, or banking agencies but that of the court. *Pan American World Airways, Inc. v. United States, Supra,* at 330 (dissenting opinion); *Brown Shoe Co. v. United States, supra,* at 368 (Harlan, J., concurring in part and dissenting in part). *Cf. United States v. Radio Corporation of America, supra.*

Accordingly, we reject all "expert" conclusions defining the relevant geographic market for wholesale accounts first because, except for the Federal Reserve Board,[134] it is superfluous lay opinion on a complex economic-legal problem (*United States v. Philadelphia National Bank, supra,* at 367; 7 Wigmore, Evidence § 1918, p. 10, § 1952, p. 81 (3d ed. 1940)),[135] and second because the opinion or contention that the geographic market for wholesale accounts is confined to the City of New York as the government urges, or partly local and partly

134 We have assumed here, under our *ad hoc* application of the doctrine of primary jurisdiction, that the Federal Reserve Board acted under Clayton § 11, where it is authorized to decide legal antitrust questions, and its findings of fact and conclusions may well be final if supported by substantial evidence. Its errors of law are, nonetheless, subject to judicial correction.

135 The same vice permeates four affidavits offered by the government (PX 3, 4, 5, and 6) and four counter-affidavits offered by defendant (DX 42, 43, 44, and 45) giving competitors' opinions, pro and con, on the present and future competitive effect of the merger. This is a law suit, not an opinion poll. We neither need nor welcome a poll of competitors as to which side ought to win. PX 3, 4, 5, and 6 are also barren of facts and saturated with hearsay, assumptions, speculation, prophecies, arguments, theories, and conclusions. The four affiants echo the government's brief like a quartet of parrots and their opinions are manifestly contaminated with bias and self-interest. The antitrust laws are neither a shield nor a sword for competitors motivated by fear of competition. *Brown Shoe Co. v. United States, supra,* at 320, 344. PX 3, 4, 5, and 6 are thus unreliable and do not rise to the dignity of evidence under the most complacement standards. We, therefore, grant defendant's motion to strike them in their entirety. DX 42, 43, 44, 45, 46, and 47 do contain concrete facts and proper opinions on banking matters. We, therefore, accept them to that extent, but strike all opinions contained in them respecting the competitive effect of the merger. We also grant the government's motion to strike all opinions and conclusions as to the competitive effect of the merger contained in DX 1, DX 1-Memorandum, and several other defense exhibits.

national respecting some wholesale accounts, as defendant and the Attorney General led the banking agencies to conclude, is erroneous as a matter of law and, as we shall see later, leads to unsound conclusions.

Expert opinion on facts about the banking business, however, is a different matter. Experts in the banking field are manifestly competent to express an opinion on the competitive realities of the industry. Surely the agencies, authorized to pry into confidential matters and competitive secrets, know more about who is banking with whom than we can ever hope to learn from the fragments of evidence before us.[136] They assure us that large banks of the nation's many large cities aggressively compete with banks outside their own locality for large accounts, and that large customers do turn to banks outside their own locality, to a nation-wide area, for banking services. Defendant's experts, all experienced bankers or economists of unquestioned qualifications, gave the same opinion.

This is indeed persuasive evidence that effective competition for wholesale accounts is nationwide, for the government offers no expert or other evidence to the contrary. Nor did it in any way impair the testimony of defendant's experts on cross-examination. No reason appears for doubting the accuracy or credibility of their testimony. "The existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the business which they have carried on, assert that there . . . [is] real competition in respect of the particular product, their testimony is to be weighed like that in respect of other matters of fact. And since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted." *International Shoe Co. v. Federal Trade Comm'n, supra,* at 299.

Instead of refuting the expert opinions offered by defendant, confirmed by the agencies, and supported by substantial objective evidence, the government jumps from evidence that many wholesale customers have an address or are physically located wholly or partially inside the City of New York to the conclusion that the geographic area of effective competition for wholesale accounts is confined to New York

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136 *Cf. Whitney National Bank* v. *Bank of New Orleans, supra,* 33 U. S. L. Week 4153, at 4154-55.

City. The government then seizes on a wholesale customer's geographic location where it favors its definition of the relevant market and ignores that factor where it works to its disadvantage. Thus, it seizes on geographic location to localize competition for large concerns with an address or physical location entirely or partially within the City of New York but ignores geographic location to sweep outside customers and those with multiple geographic locations into the local market.[137] Similarly, looking to the location of competitors and customers, defendant commingles the geographic markets by claiming that the market for seven categories of wholesale accounts is partly local and partly national. We think, however, that both parties and all the agencies have labored under a mistaken concept of a relevant geographic market under the antitrust laws.

The phrase "any section of the country," contained in Clayton § 7, refers not to a definite geographic area of the country but to the geographic area of effective competition in the relevant line of commerce. *Brown Shoe Co.* v. *United States, supra,* at 320 n.35. The proper question to be asked, therefore, is not where is the customer located, but what is the geographic area of effective competition for his patronage. When the area of effective competition is confined to the customer's own locality, as is the case with retail customers, so is the relevant geographic market, but when the area of effective competition embraces the nation, as is the case with wholesale customers, so does the relevant geographic market. Thus, in order to analyze the impact of this merger in true perspective, we must direct our quest to the geographic area in which competitors operate and to which wholesale customers *can* practicably turn for the relevant banking service. *Tampa Electric Co.* v. *Nashville Coal Co., supra,* at 327.

The geographic boundaries of the area of effective competition must, therefore, be drawn broadly enough to include the location of all effective competitors, actual and potential, and the location of all customers, actual and potential, who can practicably turn to them for the relevant product. *Cf. United States* v. *Bethlehem Steel Corp., supra,* at 599-600. The evidence shows that large banks of the nation's large cities do reach outside their own locality, to a nationwide area, for wholesale customers and that wholesale customers do choose banks

137 See PX 15 and numerous proposed findings based on the exhibit.

outside their own locality and conduct their banking business throughout the nation. The relevant product, wholesale banking service, is not a heavy commodity where differentials in freight costs and delivery intervals make proximity of supplier and customer essential to effective competition,[138] as in *Crown Zellerbach Corp.* v. *Federal Trade Comm'n,* 296 F. 2d 800 (9th Cir. 1961), *cert. denied,* 370 U.S. 937 (1962) or *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 259 F. 2d 524 (2d Cir. 1958).

Nor does the factor of inconvenience localize effective competition for wholesale accounts. The relevant product in the national market is an intangible — large sums of money in the form of credits and debits. The product is capable of convenient, cheap, and instantaneous transmission from one bank to another, or from one customer to another, in any part of the nation or the world simply by effecting debits or credits to the wholesale customer's account by telegraph, cable, or telephone. Indeed, the government admits that the constituent banks and their customers regularly used the telephone and telegraph for that very purpose (Complaint, para. 14). Surely such facilities are also used by all large banks and wholesale customers located in large cities throughout the country.[139] The most distant bank is therefore no further away and no more inconvenient to a wholesale customer than the nearest telephone, telegraph office or mailbox, as the complaint acknowledges.[140]

The time dimension of money makes instantaneous transmission of large loans and deposits from one section of the country to another imperative, otherwise large sums would be tied up in float, with interest

138 The Senate Committee Report on Clayton § 7 recognizes that "what constitutes a section will vary with the nature of the product. . . . A section which would be economically significant for a heavy, durable product . . . might well be meaningless for a light product. . . ." S. Rep. No. 1775, pp. 5-6.

139 The Federal Reserve leased wire system provides easy nationwide accessibility to the country's banks. All twelve Federal Reserve Banks, their 24 branches and Treasury offices in Washington and Chicago, are joined by this network. More than 200 commercial banks located in 60 large cities are also linked together by a bank wire. This system is used by commercial banks to conduct nationwide banking transactions for themselves or their customers in a matter of minutes. Madden, The Money Side of "The Street," pp. 25-26.

140 *Id.* at 30.

running and working capital idle, while checks are in transit through the mails.[141]

Consequently, large concerns find it both convenient and necessary to channel their receipts into post office boxes, and thence to a bank acting as its agent in the locality of collections, and to transmit disbursements by bank wire to banks located in the area where money is needed to cover payrolls and conduct operations and trade. The nature of the product, mobility of demand, nationwide commerce, and sophisticated customers thus impel large banks and large customers to do business with each other at a distance, in a nationwide area. That fact favors a choice of a nationwide market for wholesale accounts. *Brown Shoe Co.* v. *United States, supra,* at 328.

There is no dispute that both Manufacturers and Hanover did a large amount of business throughout the United States with large customers far removed from the metropolitan area. Nor is there dispute that large customers far removed from the area, and located in every region of the country, borrowed large sums and made large deposits at both banks.[142] That banks located close to such customers effectively

141 *Id.* at 25-26.

142 THE CONSTITUENT BANKS' BUSINESS WITH CUSTOMERS LOCATED ENTIRELY OUTSIDE THE METROPOLITAN AREA, IN 35 DIFFERENT STATES (December 31, 1960).*

	Manufacturers		*Hanover*	
	Amount in Millions	*Percentage of Outside Customers Within Category*	*Amount in Millions*	*Percentage of Outside Customers Within Category*
Commercial & Industrial Loans over $100,000 (PX 15)	$195,084	30.8%	$281,758	48.6%
IPC Regular Checking over $100,000 (PX 16)	107,142	17.4	145,523	27.2
Loans to Brokers & Dealers (PX 18)	132	0.1	345	1.3
Real Estate Loans (DX 18; DX 3)	89,731	72.6	6,642	34.9
Single Payment Loans to Individuals over $25,000 (PX 17)	5,198	9.9	7,437	17.8

* DX 63.

compete against the New York intruders for wholesale accounts is supported by the very survey upon which the government relies, showing the distribution of the nation's business loans (PX 2), and by evidence here that over 83% of Manufacturers and over 91% of Hanover's commercial and industrial borrowers with loans over $100,000, who were located entirely outside the metropolitan area, also had loans or lines of credit with outside commercial banks (DX 62(c)).

Likewise, as we have seen, there are numerous banks throughout the country with resources great enough to drive and enable them to solicit outside their own locality for wholesale accounts.[143] It is not surprising, therefore, that in wholesale banking the metropolitan area is by no means the exclusive domain of New York banks. The banking agencies and defendant's experts tell us that large banks located in the nation's other financial centers aggressively compete for wholesale accounts within the metropolitan area and that many of the largest outside banks have offices in the City. The uncontradicted testimony is that banks located elsewhere throughout the country and the world solicit and make loans to large concerns located in the metropolitan area, either directly or through agencies of New York City money brokers. That testimony is corroborated by evidence that 41% of Manufacturers and nearly 60% of Hanover's commercial and industrial borrowers of $100,000 or more, who have offices within but plants and facilities outside the metropolitan area, also had loans or lines of credit with banks located outside the metropolitan area (DX 62(b)). That was also true of over 8% of Manufacturers and over 6% of Hanover's borrowers of such an amount who were located entirely inside the metropolitan area (DX 62(a)).[144] Thus, the obstacle of customer inconvenience, claimed by the government to localize every customer's choice of a

143 The nation has "many banks [which] place loans and solicit deposits outside their home area." *United States* v. *Philadelphia National Bank, supra,* at 325.

144 There is no evidence showing the amount of business done by outside competitors within the metropolitan area. We should not assume, however, that the banking agencies could not supply the missing data or at least make a rational estimate. We infer that the amount is substantial from the size and obvious credit rating of the borrowers and the fact that, irrespective of geographic location, 40% of defendant's commercial and industrial borrowers with loans of $100,000 or more also had credit relationships with outside banks, and over 85% of its depositors with accounts that large had deposit relationships with outside banks.

bank[145] and bar outside competitors, has been successfully hurdled with respect to wholesale customers not only by Manufacturers and Hanover but also by banks located outside the metropolitan area. Large outside banks have penetrated New York, and large New York banks have operated throughout the country. Each has been able to enter the locality of the other and compete effectively with distant commercial banks for the patronage of distant wholesale customers. Manifestly wholesale customers, irrespective of their geographic location, have turned to distant banks, outside their own locality, for part of their banking needs. Indeed, the Supreme Court recognized in *Philadelphia* that "large borrowers and large depositors . . . may find it practical to do a large part of their banking business outside their home community. . . ." *Id.* at 360.

We find, therefore, that large customers do not confine their patronage to banks in their local community, as the government contends, and that they do find it practical and convenient to conduct a large part of their banking business at a distance, in a nationwide area.

A relevant geographic market cannot be defined, however, solely on the basis of where the constituent banks and their competitors have actually done business, or even where customers have actually turned for their banking needs. The market must be drawn also on the basis

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145 The government did not produce a shred of evidence to support its claim that the factor of inconvenience restricts large customers to their own locality in their choice of a bank. Instead, it seized upon an isolated sentence from Philadelphia as proof here that "individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance." The statement, of course, is not evidence here, and surely we cannot rely on "canned" facts. In any event, its inapplicability to large customers was plainly recognized by the Supreme Court in *Philadelphia,* at 358-60 nn. 35, 36 & 37, 368 n. 45. Moreover, the quoted statement was imported into the *Philadelphia* opinion from *Transamerica Corp.* v. *Board of Governors, supra,* at 206 F. 2d 169, where the Federal Reserve Board sought to define a geographic market embracing five states but was hoisted on its own petard because of its own ill-advised administrative finding, based on an assumption, "that the local community in which a commercial bank is located is its area of competition." In any event, the evidence here clearly compels the conclusion that wholesale customers find it practical and convenient to spread their deposits and loans around the country in response to their changing needs and the supply of, and demand for, money. See PX 2; The Federal Reserve System: Purposes and Functions, p. 88.

of potential competition. Where could the banks do business, and where could customers practically turn for alternative sources of supply? *United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964); *United States* v. *El Paso Natural Gas Co., supra,* at 661-62; *United States* v. *Bethlehem Steel Corp., supra,* at 599.

As we have seen, banks located inside and outside the metropolitan area are continually bidding in each other's locality for wholesale customers. This actual and potential competition restrains both the metropolitan banks and their outside competitors from charging excessive interest rates and operates to keep interest rates in the nation's financial centers in close alignment.

The mere presence of numerous strong competitors, aggressively pushing into each other's locality, exerts a powerful force which must be reckoned with in all of the nation's financial centers, even though outside competitors never win inside wholesale customers and although inside wholesale customers never turn to outside banks. *United States* v. *Penn-Olin Chem. Co., supra,* at 174. "Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice." *United States* v. *El Paso Natural Gas Co., supra,* at 661. *A fortiori,* when outside competitors have successfully made inroads and are continuously bidding for more customers in the local bank's territory, there is an insistent, constant, effective, and substantial competitive confrontation between the inside bank and the outside bank. Each is attempting to expand its business at the other's expense. Each is thus engaged in a struggle with the other to hold old customers and win new ones. Each poses a constant threat to the other's wholesale business, and in an integrated country, spanned in seconds by telephone and in hours by jet plane, the threat is real. Likewise, if inside wholesale customers have in fact turned to outside banks, others are readily able to do so if the inside bank is unable or unwilling to satisfy their needs on satisfactory terms.[146]

Potential competition thus operates openly and subtly to prevent both inside and outside competitors from charging excessive prices

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146 *Cf. United States* v. *Philadelphia National Bank, supra,* at 371: "The only businesses located in the Philadelphia area which find [the Philadelphia banks' lending] limits inadequate are large enough readily to obtain credit in other cities."

or exacting onerous conditions and provides a bargaining lever for wholesale customers. *Cf. United States* v. *Penn-Olin Chem. Co., supra,* at 174. That this is no fanciful theory but a competitive reality in wholesale banking is demonstrated by the fact that the potential, if not the actual, competition of a distant bank acts as a ceiling or control on the interest rates, terms, and conditions which a bank may impose upon wholesale borrowers located in its home area. The Federal Reserve Board tells us that regional credit markets for wholesale accounts are interrelated, and none is so separate that the large customers and large competitors of one region are not affected by the price and the supply of, and demand for, credit in the others.

Plainly, interest rates in one region affect interest rates in the others, and large borrowers move from one region to another in response to changing costs. Thus, competitive happenings in one region have a direct and immediate impact on wholesale banking throughout the country. That fact, we think, favors a choice of a nationwide market for wholesale banking, for "the geographic market for the purposes of determining the impact of a merger can include all areas where the trade is a product is affected by, and is not independent of, the trade in that product in other areas — for example, if a change in price in one area has an affect on price in another area both areas may be included in one geographic market." *United States* v. *Bethlehem Steel Corp., supra,* at 599-600; S.Rep. No. 1775, pp. 5-6.

The fact, moreover, that Manufacturers and Hanover were substantial alternatives sources of supply for wholesale customers throughout the nation also favors the choice of a nationwide market for wholesale accounts. *United States* v. *Bethlehem Steel Corp., supra,* at 601. We are taught that "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Brown Shoe Co.* v. *United States, supra,* at 326. Finally, the market must not be drawn "so narrowly as to place . . . [the parties to the merger] in different markets, because only the smallest customers are considered." *United States* v. *Philadelphia National Bank, supra,* at 361.

We recognize, however, that the national market for wholesale accounts is not uniform. Populous regions and those with a highly developed economy obviously have greater need for wholesale banking

services than sparsely settled or underdeveloped areas. We realize also that the impact of this merger on wholesale banking may not be uniform throughout the country. It obviously has a greater significance in the nation's financial centers than elsewhere. That fact, however, does not preclude our choice of a nationwide market. *Cf. Brown Shoe Co.* v. *United States, supra,* at 337-38.

Nor do we see any reason for separating the New York metropolitan area from the balance of the country merely because the constituent banks were located in New York, or because many wholesale customers are located there, wholly or partially, or because the area is the financial capital of the nation and may now have a larger share of the nation's wholesale banking business than any other single financial center. Those facts, we think, all favor the choice of a nationwide market. Furthermore, as we have seen, New York's share is steadily declining, and the trend is clearly against the City with the disparate growth rate of the rest of the country. That fact bears on our prediction of the future competitive effect of this merger in judging its validity under Clayton § 7.

Finally, as we have seen, the massive and elaborate underlying economy of the metropolitan area and the wholesale banking industry built upon it is so integrated with, interrelated to, interdependent upon, and enmeshed with the rest of the nation that wholesale banking in the area and in the rest of the country are inseparably linked together. Each segment is dependent upon and influenced by what happens in the other, and both should be analyzed together, as one nationwide market.

The foregoing considerations demonstrate, we think, that the entire nation is the place where, within the area of competitive overlap, this merger is likely to have a direct and immediate impact, if it has had any impact at all, on wholesale banking. *Cf. United States* v. *Bethlehem Steel Corp., supra,* at 601.

Accordingly, we conclude that the relevant geographic area of effective competition for all wholesale accounts is the entire United States, regardless of the customer's location. Thus, we must deal with two geographic markets and the problem of ascertaining the competitive effect of this merger in each. We turn, therefore, to the allocation of the accounts of the constituent banks to their relevant geographic market.

J. *Geographic Allocation of the Accounts of the Parties to the Merger.*

The government makes no attempt to allocate accounts, but relies on its one market theory and proposes that we separately analyze the quantity of competition previously existing between the constituent banks in certain banking services[147] which it arbitrarily selects as product submarkets. Defendant contends that there is neither authority nor proof upon which to base a determination that the government's selected categories of services are separate lines of commerce. We agree. Defendant proposes that we analyze all categories of services separately and measure the degree of competition between the constituent banks and the effect of its elimination on all competitors in both markets. Both sides present a maze of statistics to prove their contentions. Those offered by the government commingle the geographic markets and dissect selected categories of deposits and loans. Those offered by defendant dissect deposits and loans of all categories of banking services and homogenize the geographic markets in some, but not in other, categories. We have examined the maze thoroughly and find neither position sound. Both obfuscate analysis and would lead us to serious error.

The government's premise that a look at a selected part reveals the whole is specious. It would have us consider only the debit side of the ledger and ignore the fact of two geographic markets. Obviously, if we ignore the many and substantial categories where competition between the constituent banks was either non-existent or comparatively minimal and focus only upon those categories where competition was substantial, we will reach the distorted conclusion that the activities of the banks were substantially competitive and not complementary. In short, the government cannot gerrymander the market any way it chooses.

Likewise defendant's premise is specious. While we agree that a valid conclusion can only be reached by looking at the whole picture, we must recognize meaningful competition where competition, in fact,

147 Commercial and industrial loans; regular checking accounts of individuals, partnerships, and corporations; single payment loans; loans to brokers and dealers; loans to finance companies; bankers' acceptances; and personal and corporate trust services.

exists. *Cf. United States* v. *Continental Can Co., supra,* at 453; *Brown Shoe Co.* v. *United States, supra,* at 326. Defendant cannot, on the one hand, insist that national business be substracted from total deposits and loans before assessing the competitive impact in the local market and, on the other, ask us to fragmentize the deposits and loans of the constituent banks and homogenize the markets in some, but not in other, categories for the purpose of determining the degree of competition formerly existing between the parties to the merger. In short, defendant can neither have it both ways, nor scramble the markets any way it chooses.

The competitive effect of the merger must be judged with regard to the fact that both banks competed in varying degrees in retail and wholesale banking and operated in two geographic markets. If the product and geographic markets are scrambled, as defendant urges, or selected services homogenized and analyzed while others are ignored, as the government urges, probable anticompetitive effects in one market might be offset by pro-competitive consequences in the other, leading us to a false conclusion that on balance the merger may, or may not, restrain trade, substantially lesson competition, or tend to monopoly in either market. Such an approach to the problem is fundamentally unsound and was definitively rejected by the Supreme Court in *United States* v. *Philadelphia National Bank, supra,* at 370. That error lies at the root of the banking agencies' conclusions and on the doorstep of both litigants.

Thus, we find neither the government's nor the defendant's approach helpful to analysis of the competitive effect of this merger in true perspective. We must therefore allocate the accounts of the constituent banks to their respective geographic markets for the purpose of fashioning a tool for separate analysis of the competitive effect of the elimination of former competition between the constituent banks in each of the markets.

Obviously we cannot allocate accounts to their respective geographic markets unless we can identify and separate the accounts subject to nationwide competition from those subject only to local competition. The banking agencies and defendant's experts, in giving their opinions on whether competition for an account is local or nationwide, relied not only on their own observations and expertise, but supported their views with substantial evidence consisting of economic data relevant

to the size and strength of the customer, the nature of his commerce, the location of his offices, plants, and facilities, his net worth and credit standing, the liquidity of collateral security, his actual banking relationships, and the presence or absence of nationwide competition. In applying the economic evidence, the experts and the agencies used norms such as local firms, nationally-known concerns, firms doing a nationwide business, firms of national stature, wholesale customers, retail customers, large customers, small customers, large loans or deposits, small loans or deposits, established borrowers, borrowers with a high credit rating or substantial net worth, prime borrowers, etc. We have examined the list of large customers, and it is fair to say that it is a roster of "Who's Who" in American industry.

The government, on cross-examination of defendant's experts, established only the obvious fact that the norms employed are imprecise and that there is no definite criterion for differentiating large from small, local from national, retail from wholesale, etc. Vague terms, however, are not meaningless. They are useful so long as they mark some useful distinction. Those employed by the agencies and experts are all ordinary terms used to express ideas in common usage and understanding and certainly are no fuzzier than norms applied by courts and juries every day in giving concrete expression to imprecise concepts. Indeed, the Supreme Court itself speaks in terms of large and small customers, local and nationally-known concerns, etc. in both *Philadelphia* and *Lexington.*

Defendant has presented voluminous statistics and economic data, like that considered by the agencies, all designed to prove that large customers have such economic strength that as a practical matter they can, and do, turn to a nationwide, and in some cases worldwide, area for their banking needs. There is merit to defendant's basic contention that large customers do find it practical and convenient to bank where they choose. Evaluation of such evidence and application of such norms, however, to the problem of differentiating local from national accounts lies not in the domain of the court but in the province of the banking agencies, for the task requires experienced observation of the competitive realities of the banking industry, subjective economic judgments, inferences and interpretations based on expertise, nice discretionary choices, specialized knowledge, skill and competence, practical experience, intimate familiarity with the industry, and, in part, upon facts

observed or known to the agencies and experts, outside this record. Courts are neither equipped to embark on the broad economic inquiry essential to the unaided application of such imprecise standards,[148] nor competent to second-guess the experts. That, of course, is the compelling reason for invoking the doctrine of primary jurisdiction in this case.[149] We can solve the problem of allocating the accounts of the constitutent banks, however, without relying on the doctrine.

Our concern is not so much with whether an account is large or small, retail or wholesale, etc., but with the definite and observable fact of whether or not banks encounter effective nationwide competition for a particular kind or size of an account. Surely, at the very least, experts in the field are competent to express an opinion on such objective banking facts based on their observations and experience. *International Shoe Co.* v. *Federal Trade Comm'n, supra,* at 361. Indeed, the findings of the Federal Reserve Board on the subject may well be conclusive under our *ad hoc* application of the doctrine of primary jurisdiction, for they were clearly based on substantial evidence. 15 U.S.C. § 21(c). *Cf. Whitney National Bank* v. *Bank of New Orleans, supra.* Although the Board's "findings" are inexplicit, they may be implied from the evidence before it, including the reports of the other state and federal banking agencies, and from the Board's conclusion that Hanover was almost exclusively a wholesale bank engaged in national operations.

The banking agencies and defendant's experts have thus given us workable guidelines for differentiating local from national accounts. If their demarcation lines are debatable, the government offers no debate. It tenders no expert opinion, nor did it cross-examine defend-

148 *United States* v. *Philadelphia National Bank, supra,* at 363.

149 *Cf. Whitney National Bank* v. *Bank of New Orleans, supra,* 33 U.S.L. Week 4153, at 4154-55; *United States* v. *Western Pac. R. Co., supra,* at 63-65; *Far East Conference* v. *United States, supra,* at 574. "The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. See 38 Stat. 734, 736, as amended, 15 U.S.C. §§ 21, 25. Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance." *Standard Oil Co. of California* v. *United States supra,* at 310 n.13.

ant's experts on the subject of whether New York banks do encounter effective nation-wide competition for particular accounts. The experts thus stand uncontradicted and unimpeached. Their opinions, we find, were neither arbitrary nor capricious, but were rationally based on sound reasoning and substantial concrete evidence which we do not stop to detail.[150] Imperfections are inherent in the problem, but the antitrust laws do not demand mathematical certainty in the solution of complex and elusive socio-economic problems. Rather, workable compromises based on substantial evidence and rational judgments suffice. *Cf. United States* v. *Philadelphia National Bank, supra,* at 361. The agencies' opinions were given in the impartial discharge of their duties to the public, and there is no reason why we should not accept their opinions wherever helpful to or analysis and every reason why we should. 7 Wigmore, Evidence § 1923, p. 21 (ed ed. 1940); *International Shoe Co.* v. *Federal Trade Comm'n, supra,* at 29. *Cf.* Administrative Procedures Act, 5 U.S.C. § 1009(e); *Whitney National Bank* v. *Bank of New Orleans, supra; United States* v. *Philadelphia National Bank, supra,* at 361. We think sensible accommodations of court and agency permits nothing less if this six-headed monster,[151] created to regulate bank mergers, means anything other than senseless feuding and a colossal waste of time, effort, and money. Finally, as a practical matter, we must either resort to expert help in fashioning an analytical tool or ignore the competitive reality that this case involves both a local and a national geographic market.

Accordingly, we find, on the basis of the foregoing analysis of the relevant geographic markets, the uncontradicted expert opinions, and other evidence and stipulations before us that the accounts of the constituent banks are allocable to the local and national markets, as follows:

150 The opinions of the experts and the evidence on which they relied are set forth in DX 1 and several other defense exhibits. The opinions of the banking agencies are in their reports, and the evidence on which their opinions were based is detailed in DX 1. We adopt all the opinions respecting objective banking facts as to the kind, type, and size of account subject to nation-wide competition as part of our findings of fact. The parties may, if they wish, submit supplementary findings detailing such oinions and the evidence on which they were based, as well as other evidence on the subject which was presented to us but not to the agenceis. We will assume that such additional data was within the knowledge of the experts and agencies.

151 The New York Superintendent of Banks, the Federal Reserve Board, the F.D.I.C., the Comptroller, the Attorney General, and the court.

Local Market	*National Market*
Special Checking Accounts	Demand Deposits over $100,000
Demand Deposits under $100,000	Time Deposits other than Savings Accounts
Savings Accounts, including Christmas Club Accounts	Commercial and Industrial Loans over $100,000
Consumer Installment Loans	Loans to Financial Institutions
Commercial and Industrial Loans under $100,000	Loans to Brokers and Dealers to purchase or carry securities
Real Estate Loans on properties located in the metropolitan area	Loans to Others to purchase or carry securities
Single Payment Loans to Individuals under $25,000	Real Estate Loans on properties located outside the metropolitan area
Voluntary and Court Trusts	Single Payment Loans to Individuals over $25,000
Stock Transfer Agencies and Registrarships for stocks listed on the New York Stock Exchange	Agency and Custody Accounts
	Trusteeships for securities issues
	Trusteeships for Pension and other Employee Welfare Funds
	Stock Transfer Agencies and Registrarships for stocks listed on the American Stock Exchange
	Dividend Disbursing Agencies
	Bond and Coupon Paying Agencies

A detailed computation of the number, amount, and percentage of the deposits and loans of Manufacturers and Hanover which are allocable to the local and national markets is set forth in Appendix A. We conclude that 50.37% of the amount of the deposits and 24.10% of the amount of the loans of Manufacturers are allocable to the local market. The comparable percentages for Hanover are 18.34% and 4.34%. The complementary percentages allocable to the national market are 49.63% of the deposits and 75.90% of the loans of Manufacturers, and 82.68% of the deposits and 95.66% of the loans of Hanover.

Having determined the portion of Manufacturers and Hanover's business allocable to each geographic market, we turn to the parties' contentions respecting market shares.

K. *Market Shares.*

We note at the outset that at the administrative stage neither the applicant, the Attorney General, nor any of the banking agencies made any attempt to calculate market shares in either geographic market, although all recognized that there were at least two markets. Rather, the market share statistics on which all relied respecting relative size, rank, and concentration commingled the product and geographic markets and were, therefore, spurious. The banking agencies, following the approach of the application, avoided the problem of calculating market shares by considering each category of banking service separately and analyzing the competitive effect of the merger with respect to each category on the basis of whether competition for the size and type of account was local, national, international, or partly local and partly national, as defendant claimed as to some accounts.

The government here avoids the problem of separating the geographic markets and calculating market shares in each of them by reliance upon its theory that New York City should be treated separately from the rest of the country. We have rejected that contention both as to the local and national markets. Nevertheless, we set forth the government's figures in order to deal with the parties' contentions.

Relative shares immediately before and after the merger, according to the government's one market theory, if applied to the metropolitan area, are detailed in Appendix B and are as follows: There is nothing wrong with the government's arithmetic, and its one market approach has the appeal of simplicity. We find, however, that we cannot float downstream with the government's easy solution for its raft is too fragile to bear its burden of proof.

DISTRIBUTION OF ASSETS, DEPOSITS AND LOANS
OF BANKS LOCATED IN THE METROPOLITAN AREA
(December 31, 1960)

Banks Ranked by Size of Assets	Assets Amount (000's)	Assets Percent*	Deposits Amount (000's)	Deposits Percent*	Loans Amount (000's)	Loans Percent*
Chase Manhattan	$ 8,936,066	20.25%	$ 7,477,333	20.01%	$ 4,409,905	21.09%
First Nat'l City	7,792,429	17.65	6,570,777	17.59	3,749,840	17.93
(Post-Merger Mfgrs. Han.)	(6,001,779)	(13.59)	(5,189,775)	(13.88)	(2,488,519)	(11.89)
Chem. Bk. N.Y.	4,439,771	10.06	3,798,313	10.16	2,186,350	10.45
Morgan Guaranty	4,245,233	9.62	3,409,529	9.12	2,262,615	10.82
Manufacturers	3,845,364	8.71	3,453,329	9.24	1,540,092	7.36
(Pre-Merger Five Largest)		(66.29)		(66.12)		(67.65)
Bankers Trust	3,350,052	7.59	2,919,682	7.81	1,517,321	7.25
Irving Trust	2,250,375	5.09	1,994,294	5.33	976,134	4.66
Hanover	2,156,415	4.88	1,736,446	4.64	948,427	4.53
Subtotal	$37,015,705	83.85%	$31,359,703	83.90%	$17,590,684	84.09%
64 Other Banks	7,110,072	16.15	5,991,783	16.10	3,318,671	15.91
Total All Banks	$44,125,777	100%	$37,351,486	100%	$20,909,355	100%

*Total percentages represent actual total of columns rather than rounded totals shown in Appendix B.

The government's simplified case is specious. Its market is artificial. The uncontradicted evidence is that wholesale accounts originate in a nationwide market—the geographic area of effective competition—and not in the local market. Ignoring that evidence, the government creates its market by equating the local geographic area with the relevant market for wholesale accounts. Its equation is constructed by substituting the fallacy that the bulk of wholesale accounts originates in the local market area for the fact that most wholesale customers have some sort of physical location or address wholly or partially within the local geographic area. The switch allows the government to draw its facts from its conclusion and then circle back and use them to lay a foundation for its market. The government then erects a superstructure of statistics which appears to represent market shares in one geographic market, but which actually homogenizes the deposits and loans of two.

The government's calculation of market shares thus rests on a fiction, blinks the evidence, and ignores competitive realities. The picture which emerges definitely exaggerates the local market shares of the larger wholesale banks and does not depict the true local market shares of large integrated banks which may be greater or less than the shares shown in the government's statistics for, as we have seen, the big integrated banks like Manufacturers originate a vast but varying portion of their business in both geographic markets, while small banks originate practically all of theirs in the local market. Thus, the larger the bank the greater the likelihood of distortion, and the smaller the bank the lesser the distortion. As a result, the government's statistics are spurious, but we will work with them bearing the distortions in mind whenever they are helpful to analysis.

Defendant, relying on *Philadelphia,* urges us to "shade" the "shares" of the constituent banks by subtracting the amount of their national business from their total deposits and loans in order to arrive at their true shares of the local market. Defendant suggested on oral argument that its share should be shaded by about 40% to exclude customers located outside the metropolitan area and those with multiple geographic locations. Defendant had no suggestion as to what other banks should receive similar treatment or how much their shares should be shaded. Nor has defendant attempted a mathematical calculation of market shares in either the local or the national market in accordance with its contention. Rather, it repeats its analysis category

48-140 O—65——35

by category, as in its application to the banking agencies, and in the process commingles the geographic markets in seven categories of accounts. We reject the suggestion that defendant's apparent local market share be shaded by 40% for it is premised on an erroneous concept of the relevant geographic market. Likewise we reject its method of analyzing each category of accounts separately because it commingles the geographic markets.

Thus, neither party's analytical tools are fashioned with fidelity to competitive realities, both obfuscate analysis, and, as we have seen, both led the banking agencies and would lead us to a fundamental error.

Defendant's failure to calculate local market shares according to its basic and sound contention that national and international business (hereafter called national business) should be shaded from the local market is understandable for, as we shall see, it is impossible for lack of evidence. It is too plain for argument that national business must be excluded in calculating local market shares, and local business excluded in calculating national market shares, otherwise our analysis of the competitive effect of this merger would be predicated upon a false picture leading us to erroneous conclusions based upon a complete misunderstanding of the competitive structure of the relevant geographic markets. *United States* v. *Philadelphia National Bank, supra,* at 364 n. 40.

Determination of the local market shares of the constituent banks, however, is not a simple matter of subtracting what we have determined to be the percentages of their deposits and loans which are allocable to the national market from their total deposits and loans. Manifestly the true local market is the total deposits and loans of all the banks located in the metropolitan area, less the aggregate of their deposits and loans which originate in the national market.[152] We can-

152 The true local market [the denominator for purposes of calculating market share] is, thus, smaller than the total deposits and loans of the metropolitan area. The local market share of each local bank would be greater or less than its share of the area's total deposits and loans, depending on whether its pattern of business relative to other local banks is predominantly national or predominantly local. We think it obvious that Hanover, for example, with 82.68% of its deposits and 95.66% of its loans originating in the national market, was not the eighth largest bank in the local market. Whether Manufacturers ranked fifth, or higher or lower, is impossible to ascertain because

not deduct all national business from the area's total deposits and loans, however, without knowing the percentage of business which each local bank originates in the national market. Except for the constituent banks, there is no evidence before us on that subject.[153] Indeed,

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it had a much larger share of local business than did Hanover, and we think it quite probable that it may have outranked Morgan Guaranty in the local market. See *United States* v. *Philadelphia National Bank, supra,* at 364 n. 40.

153 Apparently there was no such evidence in the *Philadelphia* case, but the Supreme Court, nonetheless, shaded the share of the resulting bank by about 15%. There is nothing in the opinion or the record, however, to enable us to fathom how the court arrived at that percentage. In any event, having shaded the share, the court there had no further reason to deal with the 15% for it was no longer material to its determination of the impact of the merger in the Philadelphia area. We cannot adopt that course here, except to estimate Hanover's relative position in the local market, because: (1) the applicable percentage is unknown and unknowable for want of evidence; (2) the government charges that this merger is anticompetitive not only in the New York area but also in the entire United States; (3) the amount of business originated in the national market is not insignificant for there are at least 21 banks in the area, other than the constituent banks, which are among the nation's 200 largest banks and, therefore, originate a considerable, but varying portion of their deposits and loans in the national market (Appendix C), whereas in Philadelphia, apparently no banks in the area, other than the appellees, originated any significant business outside the local market (374 U. S. at 364 n. 40); and (4) we should not assume that the missing information is unobtainable, and we do not accept the government's excuse that the problem of sepaarting one geographic market from the other poses an insuperable administrative burden of polling every customer and every bank. The excuse exaggerates the problem. It also ignores the role of the banking agencies.

The agencies gave the Department of Justice their opinions as to the categories of accounts subject to national competition. Their reports make clear that wholesale customers and banks competing in the national market are relatively few in number. Surely in this age of computers, detailed records, periodic reports, examinations, and expertise, we ought not assume that the banking agencies are unfamiliar with the pattern of business of major banks and unable to ascertain, or at least make a rational estimate of, the amount of national business and the share of each national competitor. Calculation of local market shares would then have been a simple matter of subtracting the amount of each local competitor's national business from its total deposits and loans.

The dual system of enforcement under the Clayton Act plainly assigns the task of ascertaining the banking facts to the Federal Reserve Board, and the cooperative scheme of the Bank Merger Act assumes that the Department of Justice will get its banking facts straight, in the interest of uniform

in the main, this case was presented by the government as though Manufacturers and Hanover operated in a world by themselves. It is, therefore, impossible to ascertain the local market share of any bank located in the metropolitan area with certainty, although we can, and later will, estimate Hanover's relative position in the local market.

Likewise, indefinite evidence respecting the number and identity of national competitors, and no evidence whatever showing the portion of each competitor's deposits and loans which originates in the national market, make it impossible to ascertain market shares in the national market. The number and identity of the national competitors were properly the subjects of expert opinion, but none was presented. Our concern, however, is not with certainties but with reasonable probabilities.[154] We must, therefore, take a pragmatic approach and fashion some tool in order to test the validity of the government's claim that this merger offends the antitrust laws in the national market.

The evidence before us on which of the nation's 13,000-odd commercial banks compete effectively in the national market is that large businesses of necessity borrow primarily from large banks and only to a limited extent from small banks,[155] that banks with deposits of $100 million and over account for about 95% of the loans to large

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standards, before it gives its advisory opinion in order to obviate, rather than spawn, divestiture litigation. S. Rep. No. 196, 86th Cong., 1st Sess. 22 (1959). Yet the Department of Justice gave its opinion opposing this merger, admittedly on deficient information, and brought this suit knowing full well that there were two markets and charging violations in both without, so far as the record reveals, asking the agencies a single question, much less their help in separating one market from the other. Its report acknowledges that it was difficult to determine what portion of each bank's business was allocable to the local and national markets, but fails to perceive that the same information gap existed as to the other large banks. Note, Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice, 75 Harv. L. Rev. 756 (1962); Waxberg and Robinson, "Chaos in Federal Regulation of Bank Mergers: A Need for Legislative Revision," N. Y. L. J., Jan. 12, 1965, p. 1, col. 4.

154 " 'While sufficient data to support a conclusion is required, sufficient data to give the enforcement agencies, the courts and business certainly as to competitive consequences would nullify the words "Where the effect may be" in the Clayton Act and convert them into "Where the effect is." ' " *Brown Shoe Co.* v. *United States, supra,* at 341 n. 68, quoting from U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 126 (1955).

155 DX 49, p. 403; DX 48, pp. 331-32.

borrowers,[156] that deposits track loans, that the large banks of the large cities compete in a nationwide area for wholesale accounts,[157] and we take notice that something over 200 banks in 60 large cities are linked together by a nationwide bank wire.[158] We cannot identify the effective competitors in the national market with perfect accuracy, but we think that the country's 200 largest banks roughly fit the descriptions.[159]

The distribution of assets, deposits, and loans among the national competitors immediately before and after the merger is detailed in Appendix C. It shows the following:

156 RELATIVE SIZE OF BUSINESS BORROWERS AT MEMBER BANKS, BY SIZE OF BANK

Size of borrower	*All banks*	*Size of bank (total deposits, in millions of dollars)* Under 10	10-100	100-1,000	1,000 and over
	Percentage distribution within size-of-borrower group				
All borrowers*	100.0	4.1	15.9	34.9	45.1
Small	100.0	11.3	29.7	37.3	21.6
Medium	100.0	4.6	19.5	37.8	38.2
Large	100.0	0.3	4.9	30.7	64.2

* Includes a small amount of loans for borrowers whose size was not ascertained.

Source: Member Bank Lending to Small Business, 1955-57, Federal Reserve Bulletin, April 1958, p. 404 (DX 49).

157 Annual Report of the F.D.I.C. for the Year Ended December 31, 1960, p. 6, and other evidence discussed *supra*.

158 Madden, The Money Side of "The Street," p. 25.

159 DX 59.

DISTRIBUTION OF ASSETS, DEPOSITS AND LOANS HELD BY THE 200 LARGEST BANKS IN THE UNITED STATES
(December 31, 1960)

Banks Ranked by Size of Deposits	Deposits Amount (000's)	Deposits Percent*	Assets Amount (000's)	Assets Percent*	Loans Amount (000's)	Loans Percent*
Bank of America, S. F.	$ 10,805,891	8.31%	$ 11,941,981	8.17%	$ 6,699,494	9.51%
Chase Manhattan, N. Y.	8,143,349	6.26	9,260,439	6.34	4,671,862	6.63
First Nat'l City, N. Y.	7,641,524	5.87	8,668,429	5.93	4,254,929	6.04
(Post-Merger Mfgrs. Han.)	(5,350,531)	(4.11)	(6,165,984)	(4.22)	(2,480,724)	(3.51)
Chem. Bk. N. Y.	3,898,195	2.99	4,539,894	3.11	2,234,440	3.17
Morgan Guaranty, N. Y.	3,646,025	2.80	4,423,947	3.03	2,351,906	3.34
Manufacturers Tr., N. Y.	3,464,810	2.66	3,973,719	2.72	1,505,044	2.13
(Pre-Merger Six Largest)		(28.89)		(29.30)		(30.82)
Secur. 1st Nat'l, L. A.	3,283,819	2.52	3,593,664	2.46	1,646,994	2.33
Bankers Trust, N. Y.	3,032,174	2.33	3,430,253	2.35	1,567,059	2.22
First Nat'l Bk., Chic.	2,776,261	2.13	3,135,656	2.15	1,725,748	2.45
Cont.-Ill., Chicago	2,481,717	1.90	2,886,321	1.98	1,436,478	2.03
Wells Fargo, S.F.	2,448,804	1.88	2,700,339	1.85	1,412,297	2.00
Irving Trust, N. Y.	1,998,540	1.53	2,104,031	1.44	975,471	1.38
Nat'l Bk. of Detroit	1,903,894	1.46	2,097,965	1.44	797,326	1.13
Hanover Bk., N. Y.	1,885,721	1.45	2,192,265	1.50	975,680	1.38
Subtotal	$ 57,410,724	44.09%	$ 64,948,903	44.47%	$32,254,728	45.74%
186 Other Banks	72,602,393	55.91	81,171,542	55.53	38,160,950	54.26
Total 200 Largest Banks	$130,013,117	100%	$146,120,445	100%	$70,415,678	100%

* Total percentages represent actual total of columns rather than rounded totals shown in Appendix C.

The aggregate figures set forth in the above table are not a true measure of the total national market, nor of any bank's relative share, for there can be no question that most of the national competitors also originate a vast, but varying and unknown, portion of their business in their own local markets. Our market share figures, therefore, are also spurious and distorted, but inversely to those of the local market, for the smaller the bank the greater the distortion because small banks originate less business in the national market than large banks.[160]

Thus, it is impossible for want of evidence to ascertain relative shares in the national market. We will use the spurious statistics in analyzing the competitive effect of this merger, but their infirmities and distortions hamper application of the market share test employed in *United States* v. *Continental Can Co., supra; United States* v. *Aluminum Co. of America,* 377 U.S. 271 (1964); *United States* v. *First National Bank & Trust Co. of Lexington, supra;* and *United States* v. *Philadelphia National Bank, supra.*

Urging us to rely completely on its spurious statistics, the government reminds us that wherever possible, without doing violence to the legislative objectives underlying the antitrust laws, we should "lighten the burden of proof," "simplify the test of illegality," "dispense with elaborate proof of market structure, market behavior or probable anticompetitive effects," and shift the onus of justifying the transaction to defendant in the interest of sound and practicable judicial administration. *United States* v. *Philadelphia National Bank, supra,* at 362-63. This is not such a case.

However tempting the easy course, exhausting the labor, complex, elusive and fragmentary the evidence, desirable simplified tests, or great the pressures for quick solution and mass production in this congested court, if the judicial process means anything at all, we see no substitute for reliable proof and the time-consuming hunt for figures and bits of evidence buried in the record, followed by a patient sifting, fitting, weighing, and marshalling of the evidence into a meaningful pattern in order to determine the merits of the parties' contentions. *Standard Oil Co. of California* v. *United States, supra,* at 322 (Jackson, J., dissenting). To accede to the government's proposal and rely completely on spurious statistics would do violence to deeper values than those embodied in the antitrust laws. Although it is the subject of much

160 See note 155 *supra.*

debate,[161] a trial judge, we think, must function as something more than a notary public rubber-stamping the proposed findings of either party with "never thought of thinking for himself at all."[162] We have no choice, therefore, except to struggle through the maze of statistics, put the puzzle together, find the facts, and reach our conclusion without cutting corners.[163]

Market share is only one of a gamut of criteria for analyzing the competitive effect of a merger. *United States* v. *Penn-Olin Chem. Co., supra,* at 176-77; *Tampa Electric Co.* v. *Nashville Coal Co., supra,* at 329; *United States* v. *Columbia Steel Co., supra,* at 527-28. See H.R. Rep. No. 1191, p. 8. Congress did not "adopt a definition of the word 'substantially,' whether in quantitative terms of sales or assets or *market shares* or in designated qualitative terms, by which a merger's effects on competition were to be measured." *Brown Shoe Co.* v. *United States, supra,* at 321 (emphasis added). Indeed, the legislative history of Clayton § 7 "reflects a conscious avoidance of exclusively mathematical tests." *Id.* at 321 n. 36, 322 n. 38. "Obviously no magic inheres in numbers" in judging the validity of a merger under Sherman § 1 (*Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 612 (1953)), and "a judgment under [Clayton] § 7 is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future." *United States* v. *Continental Can Co., supra,* at 458. We add our view that numbers are for computers not courts.

The competitive effect of this merger must, therefore, be judged on the basis of the evidence and in the context of the market facts proved here (*Brown Shoe Co.* v. *United States, supra,* at 322 n. 38), and not in the context of the completely different market facts proved by numerology in *Alcoa, Continental Can, Lexington,* and *Philadelphia.*

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161 Handler, Recent Antitrust Developments, 63 Mich. L. Rev. 59, 69 (1964); Merger Developments in the Supreme Court, 26 A.B.A. Antitrust Section 233, 248 (1964); Handler and Robinson, The Supreme Court vs. Corporate Mergers, Fortune Magazine, Jan. 1965.

162 W. S. Gilbert, "H.M.S. Pinafore," Act I, "When I Was a Lad."

163 *United States* v. *Aluminum Co. of America, supra,* at 282 (Stewart, J., dissenting); *United States* v. *El Paso Natural Gas Co., supra,* at 656-57, and opinion of Harlan, J.; *White Motor Co.* v. *United States,* 372 U.S. 253, 264 (1963); *United States* v. *Oregon State Med. Soc.,* 343 U.S. 326, 332 (1952); Rule 52(a), Fed. R. Civ. P., 28 U.S.C.

Certain that we must gauge the validity of the merger in two geographic markets, and hampered by spurious figures, we must base our ultimate conclusion on the solid facts behind the mist of misleading statistics.[164] Nevertheless, we must deal with such statistics as we have to explore many of the parties' contentions which are focused within the framework of the spurious statistics and the number rules fashioned in *Philadelphia* and its progeny of recent merger cases in the Supreme Court. We turn then, at last, to an examination of the parties' contentions respecting the competitive effect of this merger.

The Competitive Effect of the Merger

A. *Size is not illegal.*

The government places heavy emphasis upon the size of the constituent banks and the dollar volume of their business. It contends that they were such "giants" that the merger is inherently suspect and be condemned out of hand in the absence of proof by defendant that it is not likely to have the anticompetitive effects proscribed by Clayton § 7 or Sherman § 1. Defendant contends that the constituent banks were not "giants" when measured against the scale of the economy and size of the relevant geographic markets and that, in any event, mere size neither justifies an inference of illegality nor satisfies the government's burden of proof.

There can be no question that the banks involved are "giants" in absolute terms, but in relative terms they are dwarfs compared to their markets, many of their customers, and some of their competitors. Arguments based on size, big or little, appeal not to reason or fairness but to emotion and prejudice. The government's cries may stir resonant chimes in some ears, but they strike a gong of alarm in ours. Daily experience in the trial court teaches that such pleas generally mask a meritless case and, if anything, compel an examination of the evidence with special scrutiny and cold objectivity lest our oath of office became a hollow mockery and equal justice for the rich and the poor alike an empty platitude. That is no doubt the premise underlying the rule that absolute size (wealth) standing alone proves nothing viola-

164 See Harfield, Legal Restraints on Expanding Banking Facilities, Competition and the Public Interest, 14 Bus. Law. 1016, 1027-30 (1959).

tive of the antitrust laws.[165] Were this a jury trial we would be bound to give such an instruction, and surely we can do not less than observe the law ourselves.

Size is a relative concept. Thus, if all of the commercial banks in Philadelphia were combined into one, it would be smaller than the third largest bank in the New York metropolitan area.[166] Yet, even the largest bank in the metropolitan area is smaller relative to either of its markets than the largest and second largest banks in Philadelphia were relative to theirs.[167] Similarly, all of the commercial banks in Lexington combined would be smaller in assets than First National City Trust Co., which ranks twenty-second in the New York metropolitan area.[168] Yet, in relation to their respective markets, the largest bank in the metropolitan area is twice as small as the largest bank in Lexington.[169] It would indeed be impossible for Manufacturers to attain the relative size of the defendant in *Philadelphia* or *Lexington* by merger with any other bank in the metropolitan area.

These comparisons, we think, make readily apparent that the government's emphasis on size is misleading, unwarranted, and untenable when we measure the banks involved here against the scale of the enormous markets of the metroplitan area and the whole nation which they serve. Moreover, even *Philadelphia* and *Lexington*, on which the government relies, base decision not on absolute, but on relative, size.

The government next complains that not all of the commercial banks in the area "enjoy equal stature." The fact is true, but its implicit tenet is neither a precept of the antitrust laws nor, we had always supposed, of a free society.

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165 *Tampa Electric Co.* v. *Nashville Coal Co., supra*, at 329, 334; *United States* v. *Swift & Co.*, 286 U.S. 106, 116 (1932); *United States* v. *International Harvester Co.*, 274 U.S. 693, 708 (1927); *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451 (1920).

166 *United States* v. *Philadelphia National Bank, supra*, at 370.

167 Chase Manhattan Bank, with 20.25% of the area's assets, is smaller than First Pennsylvania Bank, with 22.9%, and Philadelphia National Bank, with 21%.

168 First National City Trust Co. had assets of $164,026,000 (DX 64). The seven banks in Lexington combined held $163,378,000 in assets. See Record on Appeal, Vol. 2, p. 728, *United States* v. *First National Bank & Trust Co. of Lexington*.

169 Chase Manhattan Bank had 20.25% of the area's assets (DX 64), but First National Bank of Lexington held 39.83%. See *United States* v. *First National Bank & Trust Co. of Lexington, supra*, at 668.

Inequalities in size are inherent in the system of free, dynamic, and competitive enterprise which the antitrust laws are designed to preserve and promote. Indeed, quite probably, the mere existence of static quality in the size of competitors, however cherished by some, would be so repugnant to a truly competitive market that it might spell an unlawful conspiracy. The isolated fact, therefore, that Manufacturers and Hanover ranked high in the lineup of competitors only proves that some firms are larger than others, and that, if disparities are not undue, proves nothing except the existence of competition. Thus, even a percentage command of a market may, or may not, create or portend forbidden anticompetitive effects depending upon the setting in which that factor is placed. *Times-Picayune Pub. Co.* v. *United States, supra,* at 612; *United States* v. *Columbia Steel Co., supra,* at 527-28; *United States* v. *National Lead Co.,* 332 U.S. 319, 352-53 (1947). The decisions in *Philadelphia, Lexington, Alcoa,* and *Continental Can* teach nothing to the contrary. Rather, all are prototypes of the principle that the validity of a merger must be judged in its own unique setting.

Specifically, *Philadelphia* holds that a merger which creates a firm controlling an "undue" percentage of business in the relevant market, or threatens "undue" concentration of business in a single firm, or results in a "significant" increase in concentration of the firms in that market, is so inherently likely to lessen competition substantially that it raises a rebuttable inference of illegality under Clayton § 7. We proceed, therefore, to the question of whether this merger gives defendant control of an undue share of either market or threatens undue concentration in a single firm.

B. *The market share foreclosed by the merger is not presumptively illegal.*

It is common ground among economists, Congress, and the Supreme Court that competition is likely to be greatest when there are many sellers, none of which has a "significant" advantage in market share over smaller rivals.[170] A merger which threatens to create such

170 See *United States* v. *Philadelphia National Bank, supra,* at 363 n.38; Hale and Hale, Market Power: Size and Shape Under the Sherman Act (1958), 131-38; Bok, Mergers and the Clayton Act, 74 Harv. L. Rev. 226, 308-21 (1961); Kronstein, Miller, and Schwartz, Modern American Antitrust Law (1958), 43-47; U.S. Atty, Gen. Nat. Comm. to study the Antitrust Laws, Report 325-26 (1955).

an advantage in one firm tends to monopoly; one which threatens to create such an aggregate advantage in a few large firms tends first to oligopoly and ultimately to monopoly and, therefore, violates Clayton § 7. *United States* v. *Continental Can Co., supra,* at 461; *United States* v. *Aluminum Co. of America, supra,* at 280; *United States* v. *Philadelphia National Bank, supra,* at 363.

Whether a given merger increases the market share of the resulting firm to forbidden propositions or threatens a "significant" rise in concentration depends on the setting. *Brown Shoe Co.* v. *United States, supra,* at 321-22. The government contends that this merger, by combining the shares of the constituent banks, created a new firm with such an increased share of the market that the merger is inherently anticompetitive, presumptively illegal, and should be invalidated without further proof of anticompetitive effect unless defendant justifies the transaction. Defendant answers that its increased share is not presumptively illegal and that the government cannot so easily escape from its burden of proof.

A merger between firms occupying the same markets is known as a horizontal merger. Necessarily, such a merger combines the shares of the constituent parties and eliminates one firm from the market. It thereby automatically creates a firm with an increased share and increases concentration of the number of firms in the market. Yet, Congress, in enacting Clayton § 7, did not forbid all horizontal mergers but only those which may lessen competition substantially or tend to create a monopoly. Indeed, the legislative history of Clayton § 7 shows that Congress did not intend to impede mergers of smaller companies in order to enable them to compete more effectively with larger firms.[171] The government, therefore, proves nothing unlawful

171 See *Brown Shoe Co.* v. *United States, supra,* at 319 n.34. The government would have us invert the failing company defense enunciated in *International Shoe Co.* v. *Federal Trade Comm'n, supra,* into the proposition that thriving competitors may not merge. Such a rule would invalidate mos horizontal mergers as *per se* violations of Clayton § 7. There is nothing in th text or in the legislative history of Clayton § 7 to support any such propositio The government, thus, does not meet its burden of proof and shift the on of justifying the transaction to a defendant merely by showing that the p ties to a horizontal merger were previously successful. The critical quest under Sherman § 1 and Clayton § 7 is not how big or prosperous the par to a merger were, but whether their union unreasonably restrains trade, f shadows a substantial lessening of competition, or tends to create a mono Those proscribed effects may, or may not, follow from the merger o or prosperious conpetitors, but, as we shall see, the answer depends o setting.

by the naked fact that the acquiring firm has increased its market share or that a merger has increased concentration.

We first explore whether the market share obtained by this merger is presumptively illegal or decisive without regard to other factors.

In *United States* v. *Philadelphia National Bank, supra*,[172] the setting was that the consummation of the merger of PNB and Girard would have increased concentration in a single firm by 64% and have created a dominant bank far larger than any of its competitors. It would foreclose 30%[173] of the business in the relevant market and enjoy better than a 50% advantage in market share over its nearest rival. Moreover, if the merger were consummated, significant disparities would separate each bank except two from its closest smaller

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MARKET SHARES IN PHILADELPHIA

Before Merger				*After Merger*			
		Deposits†				*Deposits†*	
Rank	*Name*	*Share*	*Concentration*	*Rank*	*Name*	*Share*	*Concentration*
1	First Pa.	22%	22%	1	PNB & Girard	36%	36%
2	PNB	21	43%	2	First Pa.	22	58%
3	Girard	15	58%	3	Provid. Trd.	10	68%
4	Provid. Trd.	10	68%	4	Fidelity	9	77%
5	Fidelity	9	77%	5	Central-Pa.	5	82%
6–42	37 Others	23	100%	6–41	36 Others	18	100%
	Total	100%			Total	100%	

† Percentages have been rounded to equal 100%.

Source: Government's Jurisdictional Statement on Appeal, p. 8, *United States* v. *Philadelphia National Bank, supra;* 374 U.S. at 331; 201 F. Supp. at 366.

173 The government claimed that the new firm would control 37% of the assets, 36% of the deposits, and 34% of the loans, but the Supreme Court "shaded" the percentages to 30% by eliminating business which originated in a different geographic market. *United States* v. *Philadelphia National Bank, supra,* at 364 n. 40; 201 F. Supp. 366.

competitor thereby upsetting the competitive balance of the market structure.[174]

In *United States* v. *Aluminum Co. of America, supra,* Alcoa's merger with Rome increased concentration by only 4.6%, but that was significant in the setting for it was enough to cause foreclosure of 29.1% of the market by a single firm which already enjoyed a commanding lead in a market of too few competitors.[175] Again, significant disparities in market share separated each competitor except two from its nearest rival, and, as in *Philadelphia,* the increment of only 1.3% obtained by merger concentrated nearly 30% of the market in a single dominant firm.

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MARKET STRUCTURE IN PHILADELPHIA

	Deposits (Largest Share Equals 100) Before Merger	After Merger
Bank No. 1	(22%=) 100	(36%=) 100
Bank No. 2	97	62
Bank No. 3	65	28
Bank No. 4	45	26
Bank No. 5	42	15

Source: Government's Brief on Appeal, p. 10, *United States* v. *Philadelphia National Bank, supra.*

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MARKET STRUCTURE IN ALCOA

Before Merger				After Merger			
Rank	*Name*	*Share*	*Concentration*	*Rank*	*Name*	*Share*	*Concentration*
1	Alcoa	27.8%	27.8%	1	Alcoa	29.1%	29.1%
2	Kaiser	23.1	50.9%	2	Kaiser	23.1	52.2%
3	Anaconda	15.8	66.7%	3	Anaconda	15.8	68.0%
4	Reynolds	10.4	77.1%	4	Reynolds	10.4	78.4%
5	General Cable	6.0	83.1%	5	General Cable	6.0	84.4%
6	Olin Math.	4.5	87.6%	6	Olin Math.	4.5	88.9%
7	Essex	4.5	92.1%	7	Essex	4.5	93.4%
8	Southwire	2.3	94.4%	8	Southwire	2.3	95.7%
9	Rome	1.3	95.7%	9	?	?	?
	Total 9 Firms	95.7%			Total 8 Firms	95.7%	
	All Others	4.3%			All Others	4.3%	

Source: Government's Brief on Appeal, p. 19, *United States* v. *Aluminum Co. of America, supra,* and 377 U.S. 277-78.

In *United States* v. *Continental Can Co., supra,* the merger of Continental with Hazel-Atlas increased concentration by 14% but resulted in control of 25% of the market in a single firm which already ranked second.[176] Although the share foreclosed was 5% less than that found undue in *Philadelphia* and *Alcoa,* the court, holding that it approached the presumptively illegal line, lowered the bar five points, and Continental was too big to crawl under.

The local market share foreclosed by this merger does not approach those in the trilogy of cases the government summons to its aid. Here, immediately after the merger, according to the spurious shares inherent in the hypothesis of one relevant geographic market, the merger created, not a firm with a dominant one-third or one-fourth, but a bank with only a tenuous hold on about one-eighth, with 13.6% of the metropolitan area's total assets, 13.9% of the deposits, and 12% of the loans. Two years after the merger, the percentages had decreased to 11.9%, 12%, and 11.1%, respectively, and they have since declined to 11.5%, 11.6%, and 10.8%, respectively.

There can be no question that the merger created a firm with an increased share, but the increment resulted in a bank one-third to one-half smaller than its two larger local competitors, and only slightly larger than the next three. The merger narrowed the gap previously existing in the market structure between the second and third largest banks, but widened the gap between the seventh and eighth largest banks.[177]

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MARKET STRUCTURE IN CONTINENTAL CAN

Before Merger				After Merger			
Rank	*Name*	*Share*	*Concentration*	*Rank*	*Name*	*Share*	*Concentration*
1	American Can	26.8%	26.8%	1	American Can	26.8%	26.8%
2	Continental	21.9	48.7%	2	Continental	25.0	51.8%
3	Owens-Ill.	11.2	59.9%	3	Owens-Ill.	11.2	63.0%
4	Anchor-Hock.	3.8	63.7%	4	Anchor-Hock.	3.8	66.8%
5	National Can	3.3	67.0%	5	National Can	3.3	70.1%
6	Hazel-Atlas	3.1	70.1%	6	?	?	?
	Total 6 Firms	70.1%			Total 5 Firms	70.1%	
	All Others	29.9%			All Others	29.9%	

Source: *United States* v. *Continental Can Co., supra,* at 461.

177 See Appendix D.

As noted earlier, we cannot ascertain defendant's actual share of the true local market, and it may be greater or less than the shares shown by the homogeneized statistics employed in the foregoing comparisons. We are confident, however, that the government has failed to prove that defendant's share approaches the presumptively illegal lines drawn in *Philadelphia, Alcoa,* and *Continental Can.*

Viewing the merger in the national market, we note at the outset that it did not increase the share held by the three largest firms. Immediately after the merger, defendant moved to fourth place, but its incremental share did not remotely approach a decisive one-third or one-fourth of the market, but amounted only to an inconclusive and vulnerable 4.22% of the assets, 4.11% of the deposits, and 3.51% of the loans, and since the merger, with the entry of newcomers into the national market and greater relative growth rates of smaller competitors, defendant's share has declined to 3.29% of the assets, 3.41% of the deposits, and 3.27% of the loans.

Although defendant's incremental share increased deposit concentration in a single bank, the increase narrowed the gap previously existing in the competitive structure where the third largest bank had nearly a 100% advantage in market share over its closest smaller rival. The merger thereby improved the balance of the competitive structure and intensified competition for the three leaders. Moreover, unlike *Philadelphia, Alcoa,* and *Continental Can,* defendant's incremental share did not give it a decisive lead over its next smaller competitor. The gap in market share between defendant and the next ranking competitor ranged from a minimum of .35% in loans to 1.12% in deposits, and the shares of the remaining competitors were so graduated from top to bottom that no one bank had any decisive advantage in market share over its next smaller competitor.[178]

We think the foregoing analysis, though based on spurious figures, demonstrates that the government has failed to prove that defendant's true national market share approaches the 30% or 25% market shares held inherently anticompetitive in *Philadelphia, Alcoa,* and *Continental Can.* We, therefore, find nothing in the numerology of the trilogy of cases which would warrant a conclusion that this merger is inherently illegal in either market merely on the basis of the market

178 See Appendix E.

share foreclosed by defendant or the percentage of increase in concentration in a single firm.

Recognizing that even on its one market theory the share foreclosed by defendant here falls short of the line drawn in the trilogy, the government next urges that the merger is inherently anticompetitive because defendant's suprious share is greater than that found undue in other cases involving different industries, different markets, different histories, and different market structures. Defendant counters with cases sustaining mergers which created market shares greater than that foreclosed here. We think neither contention sound.[179] Manifestly, the same percentage share may be undue in one market setting and devoid of any anticompetitive repercussions in another. Like the Congress, we think that antitrust cases, with their infinite variables set in a dynamic economy, can no more be cast into rigid and static molds than can the size and shape of a cloud. Moreover, we have been taught, before, by, and since *Philadelphia,* that no particular percentage share can be deemed critical, and that the required prediction of future anticompetitive effects cannot be made without a firm understanding of the unique structure and history of the relevant markets involved in the case under consideration. *Brown Shoe Co.* v. *United States, supra,* at 321; *United States* v. *Philadelphia National Bank, supra,* at 362, 364 n.41; *United States* v. *Continental Can Co., supra,* at 456, 458.

We cannot, therefore, conclude that this merger is illegal merely because the market shares foreclosed may be greater here than the shares found undue in other cases. Nor can we conclude that the merger is lawful simply because the shares here may be less than those found undue in *Philadelphia, Alcoa,* and *Continental Can.* In short, neither *Philadelphia* nor any other case fashions a template which mechanically supplies the answers in all other merger cases as to what percentage constitutes an "undue" market share or threatens "undue" concentration in a single firm. We must look beyond numerology, therefore, to determine whether this merger has created a firm foreclosing an "undue" share of either market or threatening "undue" concentration in one firm.

Implicitly conceding as much, the government urges that the increase here offends the Clayton Act because defendant's market share

179 Congress, in amending Clayton § 7, neither adopted nor rejected such criteria. *Brown Shoe Co.* v. *United States, supra* at 320.

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gives it an advantage over smaller competitors in greater lending limits, more advertising resources, and more branch offices. There can be no question that greater lending limits give defendant an advantage over smaller competitors. Nor can there be any doubt that defendant can advertise on a scale that smaller competitors cannot afford, but, for sure, the merger has not hushed the din of rival commercials. Likewise defendant's expanded branch system — larger than any other in the area — does give it an advantage in the local market.

The fact that a merger creates a firm with an advantage over competitors is a relevant, though not a decisive, factor. "[E]xpansion [by merger] is not rendered unlawful by the mere fact that small . . . [competitors] may be adversely affected." *Brown Shoe Co.* v. *United States, supra,* at 344. *A fortiori,* there is nothing unlawful in the sole fact that a merger reduces the advantage of larger competitors; quite the contrary. A struggle for advantage over competitors, large and small, is the essence of competition,[180] and "it is competition, not competitors, which the Act protects." *Brown Shoe Co.* v. *United States, supra,* at 344. The Clayton Act, therefore, neither grants an inviolate domain to the industry leaders nor freezes smaller competitors with the *status quo.*[181] "Taken as a whole, the legislative history [of Clayton § 7] illuminates congressional concern with the protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition" substantially. *Brown Shoe Co.* v. *United States, supra,* at 320.

The government is thus required to prove something more than the naked fact that the merger creates a firm with an advantage over competitors. *Philadelphia* teaches that when market share advantage over competitors is the decisive factor, the "something more" required by Clayton § 7 is proof that the merger creates a firm foreclosing an "undue" share, or that it threatens "undue" concentration either in a single firm or in a handful of competitors. *Philadelphia, Alcoa,* and *Continental Can,* however, give little guidance, aside from the context of their own facts, on the underlying criteria for determin-

180 Comment, "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers, 68 Yale L. J. 1627, 1638 (1959).

181 See H.R. Rep. No. 1191, p. 6. *Cf. Brown Shoe Co.* v. *United States, supra,* at 319.

ing whether a given merger forecloses an "undue" share or threatens "undue" concentration in a single firm. Those cases thus afford no easy answer to this one where the share foreclosed by the resulting bank in both markets is uncertain, and on the basis of spurious statistics, far less than the shares found inherently anticompetitive there. It appears, however, from the market facts in the three cases, the legislative history of Clayton § 7, and the teaching of *Brown Shoe* and earlier cases, [182] that the key to the problem lies in whether the share of the market foreclosed by one, or a few competitors, as a result of a merger is so large relative to the shares held by remaining competitors that it threatens to arm one, or a few, with a decisive advantage in the competitive struggle, or significantly limits the opportunity for other firms to enter into, or remain in, the market.

Clayton § 7 does not contain the words "undue" or "significant." We look, therefore, to its legislative history for guidance. The Report of the House Judiciary Committee[183] observes that a significant reduction in the vigor of competition could be perceived if "the *relative* size of the acquiring corporation had increased to such a point that its advantage over competitors *threatened to be 'decisive.'*" *Brown Shoe Co.* v. *United States, supra,* at 321 n. 36 (emphasis added). It cannot be denied that a firm actually having a decisive advantage over its competitors is in the driver's seat and able to control prices and curtail competition. In short, it possesses monopoly power. *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377, 391 (1956). A merger, therefore, which threatens to create such a decisive advantage tends to create a monopoly and is illegal within the meaning of Clayton § 7. We find support for that approach both in scholarly studies[184] and in the teaching of *Brown Shoe Co.* v *United States, supra,* where, considering the same problem, but in the setting of a vertical merger, the court said, at 328-29:

182 Earlier cases taught that the share foreclosed must be found to constitute a substantial share of the relevant market. *Standard Oil Co. of California* v. *United States, supra,* at 314. "That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited." *Tampa Electric Co.* v. *Nashville Coal Co., supra,* at 328.

183 H.R. Rep. No. 1191, p. 8.

184 See Handler and Robinson, a Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Colum. L. Rev. 629, 670 (1961).

'If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act. And the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act. On the other hand, foreclosure of a *de minimus* share of the market will not tend 'substantially to lessen competition.' Between these extremes, in cases such as the one before us, in which the foreclosure is neither of monopoly nor *de minimus* proportions, the percentage of the market foreclosed [5%] by the vertical arrangement cannot itself be decisive."

We think this is just such a case for, standing alone, the share foreclosed by the defendant here is neither of incipient monopoly, nor of *de minimus*, proportions in either market. Plainly defendant's share does not give it incipient monopoly power or threaten to arm it with a decisive advantage over its remaining larger competitors, and, standing alone, its gain over smaller competitors threatens no such forbidden power in either market. Nor, standing alone, does it significantly limit the opportunities for smaller competitors to enter into, or remain in, the market. Moreover, the fact that defendant is steadily losing ground, according to the spurious statistics, speaks against any rational prediction that defendant's market share, standing alone, is undue or threatens undue concentration in a single firm in either market. Surely, in the light of the facts, we cannot speculate on the basis of spurious statistics that defendant has acquired incipient monopoly power, or an undue share of either market, as a result of this merger. Quite the contrary. The evidence indicates that defendant's share is too small, its competitors too strong, and its rivals too numerous to warrant any such prediction.

We conclude, therefore, that we cannot predicate a violation of either the Clayton or Sherman Acts solely on the factor of the marke share foreclosed by defendant in either market as a result of th merger. Nor is there anything in that factor, standing alone, whi relieves the government of its burden of proof.

C. *Concentration.*

The government asserts that both markets are highly concentrated and have witnessed a recent trend toward oligopoly. Therefore, the government urges, even though the percentage of increase in defendant's share in each market may be indecisive standing alone, nonetheless, the increase in concentration caused by the merger becomes significant and decisive when viewed in the structural setting and history of the markets. The government then predicts that this merger will trigger others and urges that this is the place to call a halt in order to curb a tendency to monopoly in its incipiency before customer alternatives disappear.

Defendant contends that this merger does not significantly augment concentration or any trend in that direction because the business of the constituent banks was more complementary than competitive, commercial banking in both markets is fragmented rather than concentrated, newcomers have entered, and the combined market share of the larger banks has remained well within the limits necessary to effective and vigorous competition among many enterprises despite past mergers. The merger, defendant asserts, does not threaten to spark a chain reaction toward undue concentration in either market because contemporary market conditions and recent changes in state and federal law make a myth of the government's predictions.

"The dominant theme pervading congressional consideration of the 1950 amendments [to Clayton § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Brown Shoe Co.* v. *United States, supra,* at 315. See also *United States* v. *Continental Can Co., supra,* at 461-62; *United States* v. *Aluminum Co. of America, supra,* at 278-81; *United States* v. *Philadelphia National Bank, supra,* at 362-70. The "keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure . . . the courts the power to brake this force *at its outset and before it gathered momentum.*" *Brown Shoe Co.* v. *United States, supra,* at 317-18 (emphasis added).

Every horizontal merger causes some increase in, and tend toward, concentration by permanently eliminating one firm from the field. Congress, however, did not make all horizontal mergers illegal *per se,* although it was plainly aware that banking, like almost every other industry in the American economy, had a history of mergers. There is, thus, no basis either in the statute or in its legislative history for equating every increase in, or tendency toward, concentration with a tendency toward oligopoly or either of the anticompetitive effects expressly proscribed by amended Clayton § 7.[185]

The grand design of Clayton § 7 was, of course, to curb tendencies toward monopoly in their incipiency, but "incipiency" is an elastic term, and it cannot be stretched to the extreme of curbing every increase in, or tendency toward, concentration. The government, therefore, does not prove its case simply by reciting "Ten Little Indians," for while Clayton § 7 bans "all mergers having *demonstrable* anticompetitive effects, Congress recognized the stimulant to competition that might flow from particular mergers." *Brown Shoe Co.* v. *United States, supra,* at 319 (emphasis added).

Whether "incipiency" should be stretched to curb an increase in, or tendency toward, concentration caused, or threatened, by a given merger depends on the setting in which those factors are placed. If concentration is already high, or if there is a strong trend in that direction, even a slight or minute increase runs afoul of Clayton § 7. *United States* v. *Continental Can Co., supra; United States* v. *Aluminum Co. of America, supra.* The ultimate question is whether *this* merger, viewed in the structure, history, and probable future of the market, is of the type which Congress intended to proscribe. *Brown Shoe Co.* v. *United States, supra,* at 329.

Having laid out the ground rules, we proceed to the probable impact of the merger on concentration in the local market.

D. *The Level of Concentration Existing in the Local Market Before the Merger.*

The initial problem is determination of the level of concentrat[ion] existing at the time of this merger. The government's contention ...

185 Handler and Robinson, The Supreme Court vs. Corporate Mergers, Fc Magazine, Jan. 1965.

the local market was oligopolistic before the merger rests not on predatory conduct or collusive behavior but on the structure and history of the market.[186] The government does not, and indeed could not, claim that the structure of the market is one of few sellers. Rather, it is the government's thesis that a comparatively few banks control a disproportionately large share of the market and that a merger trend is rapidly concentrating more and more local business and formerly independent banks into fewer and fewer hands. Therefore, the government urges, the addition to concentration, or to the trend, caused or threatened by this merger, thwarts the design of Clayton § 7 to arrest a trend toward oligopoly—the tendency to monopoly—in its incipiency.

The government suggests no criteria for determining the critical level of concentration in the local market. Instead, it invites us to compare its spurious statistics with the statistics in *Philadelphia, Alcoa,* and *Continental Can.* We find such a comparison neither necessary nor productive. The government's fragile foundation and different market facts would undermine any conclusion we might draw from matching numbers.

Defendant argues that a comparison of the level of concentration in New York with that of other metropolitan areas demonstrates that the local market is not unduly concentrated. It points to evidence that, even on the government's figures, the combined "market share" of the five largest banks is less in New York than in 57 out of 65 other metropolitan areas, the share of the three largest less than in 58 out of 65 others, and the share of the largest bank less than in 60 others. The comparisons do not afford an index for determining whether concentration is undue in the market under consideration here, for the number of competitors was more in New York than in 60 out of 65 other metropolitan areas,[187] and manifestly the share of the five largest banks in a market of 72 competitors cannot be equated to the share of

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186 The theory requires proof of market structure. Hale and Hale, Market Power: Size and Shape Under the Sherman Act (1958), ch. 3. p. 89. There is no requirement, however, that market structure be proved with mathematical certainty or perfect accuracy. *United States* v. *Philadelphia National Bank, supra.*

187 Annual Report of the F. D. I. C. for the Year Ended December 31, 1960, p. 102, Table 40.

the five largest banks in a market where, for example, there are only five or six. Concentration ratios might be computed and compared, but defendant makes no such attempt, and we think the results would still leave us without a valid gauge. Moreover, the question is not whether concentration is greater or less than elsewhere, but whether it threatens to reach anticompetitive proportions here as a result of the merger. Thus, we find both the government's and defendant's tests for measuring the critical level of concentration unsound.

The number and relative strength of firms necessary to effective competition cannot be compressed into a formula, and obviously what constitutes undue concentration in one industry or one market may not in another.[188] Banking is a regulated industry. Defendant, therefore, argues that the banking agencies are the best judges of the critical level of concentration and asks us to accept their conclusions that neither market was overly concentrated and that the merger did not increase concentration significantly. The government complains, however, that in assessing the competitive effect of the merger, the banking agencies relied only on aggregate figures; yet the government asks us to accept precisely the same sort of figures as one basis for determining concentration.

Philadelphia teaches that we are not bound by the banking agencies' conclusions and that we must judge the validity of the merger solely in the context of the antitrust laws. But surely, in the face of the banking agencies' opinions, we cannot speculate that either market is unduly concentrated or base our decision on a distorted picture merely to make things easy for the government. Once again, therefore, we must look behind the spurious statistics for some meaningful basis for rational judgment.

The aggregate figures on which the government relies are only the distorted shadow of the true local market, and it cannot be transformed into the real image by the mere incantation of numbers, dollars, and shibboleths. The real size and shape of the local market lies invisible beneath the overlapping national market, and we cannot extract it from the government's statistics unless we indulge in sheer guess-

188 U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 325 (1955).

work.[189] We think, however, that the structure of the local market can be perceived from the evidence with fidelity to competitive realities if we focus, not upon its distorted shadow, but upon its substance—the

189 If we guess that the pattern of business of each of the five largest integrated banks is *exactly* like Manufacturers', that the pattern of business of wholesale banks is *exactly* like Hanover's, and that smaller retail banks, originate *all* of their business in the local market, we could shade the shares of all the other banks in the local market (Appendix B) by applying to integrated banks the percentage of local business originated by Manufacturers, and to wholesale banks the percentage for Hanover (Appendix A). Market shares at December 31, 1960 would then be as follows:

*Shaded Deposits And Loans, As of December 31, 1960.**

Shaded Rank	*Name of Bank*	*Shaded Deposits*	*Shaded Loans*
1	Chase Manhattan Bank	21.68%	21.34%
2	First Nat'l City Bank	19.05	18.13
3	Chemical Bk. N. Y. Tr.	11.01	10.58
4	Manufacturers Trust	10.01	7.45
5	Bankers Trust	8.46	7.34
	Pre-Merger Concentration	70.21%	64.84%
14	Hanover Bank	1.83	.83
	66 Remaining Banks	27.96	34.33
	Total All Banks	100.00%	100.00%

* Formula: Sum of Deposits (Loans) of each bank allocable to Local Market= Total Local Market. Each bank's Deposits (Loans) so allocated÷Total Local Market=Local Market Share.

Source: Appendix A; Appendix B; PX 17.

Many controlling decisions of the Supreme Court were decided after the trial. The court, therefore, conducted a number of post-trial conferences with counsel, and the record was opened many times. During such conferences, without disclosing our purpose, we sought a stipulation as to the pattern of business of every bank in the metropolitan area. Laboring in the dark, the parties reached a tentative understanding on the subject in June 1964, but when a stipulation was submitted on August 19, 1964, the government inserted an escape clause, and we rejected it. The above table is the product of our efforts in the interim, but without a firm stipulation, it has no solid support in the evidence.

many accounts of the general public and small business.[190] Well over 90% of all customers are allocable to the local market. Their accounts are the countless small deposits and loans of the general public and small business (see Appendix A).[191] Such customers are fettered by convenience, local needs, etc. to their own residential or working locality for their banking alternatives. The local market, unlike the national market, deals not in a few, large, custom tailored wholesale transactions of high unit profit, but in millions of small, repetitive transactions of low unit profit. Efficient, low cost, and profitable handling of retail accounts depends on great volume[192] and mass processing of millions of transactions.[193] The business dictates economies of scale which impel retail banks to acquire or establish large branch systems with offices strategically located in commercial hubs, manufacturing centers, shopping areas, transportation intersections, and in canyons walled with the vertical population of skyscraper office buildings and high rise apartments.[194]

The amount of local business generated per branch is not uniform. A bank with one branch may do more business than another with two or three. An individual bank's relative share of the market, therefore, may be greater or less than its relative share of branches. Nonetheless, at some point advantages unique to the location, management, etc. of one branch are averaged out and overcome by other branches with like advantages and sheer numbers, and once that point is passed, there is a direct and progressive relationship between the number of branches, the number of customers, the amount of business, and market share.

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190 DX 1, pp. 27 and 28.

191 DX 1, pp. 28, 28 and 37. DX 1-Memorandum, pp. 9, 10, and 13. Studies of the F. D. I. C. show that over 95% of all deposit accounts are under $10,000. That figure was therefore selected by Congress as the appropriate limit for Federal Deposit Insurance, but Congress is currently considering increasing the limit to $25,000 which would cover over 99% of all deposit accounts. See Hearings Before House Committee on Banking and Currency on H. R. 5130, 88th Cong., 1st Sess. 5, 9, and 74 (April 24-26, 1963); N. Y. Times, April 13, 1963 p. 59, col. 5; N. Y. Times January 10, 1964, p. 59, col. 3.

192 DX 1, p. 28; DX 10, p. 14.

193 DX 1-Memorandum, p. 29.

194 DX 1, p. 18.

The greater the number of branches, the greater the volume and the greater the market share.[195]

Thus, Manufacturers with 120 branches won 1,254,313 retail customers and generated $1,383,252,000 in local deposits and $360,810,000 in loans, while Hanover with 10 branches won only 36,521 retail customers and generated only $258,383,000 in local deposits and $38,686,000 in loans. The direct relationship between number of branches, number of customers, and amount of business demonstrates that significant disparities in relative share of branches breed significant disparities in market share. As the disparities in relative share of branches increase, so do the disparities in market share. Were this not so, there is no logical explanation for the proliferation of branches. Commercial realities thus warrant an inference that concentration of branches reflects collective market share of the largest integrated banks and concentration of the local market.[196]

195 DX 1, p. 18; DX 10, p. 14; Appendix A.

196 Our equation is supported to some extent by the spurious statistics (Appendix B). Absent direct evidence of market share, imperfections are inherent in the problem. The only clues in the evidence are the actual local business of the constituent banks and the distribution of branches among competitors. We must work within the limitations of the evidence, draw reasonable inferences from known facts, and fashion tools for analysis. We are not concerned with mathematical certainties but with reasonable probabilities. Perfect accuracy must yield to workable compromises. *United States* v. *Philadelphia Nat'l Bank, supra,* at 361.

The distribution of branches in the City of New York, as of December 31, 1960, was as follows:

DISTRIBUTION OF BANKING OFFICES OF ALL COMMERCIAL BANKS LOCATED IN NEW YORK CITY
As of December 31, 1960.

Banks Ranked by Number of Banking Offices	Number of Offices	Percent[a]	Concentration
1. Manufacturers Trust	120	20.6%	20.6%
2. Chase Manhattan Bank	108	18.6	39.2%
3. Chemical Bk. N.Y. Tr.	104	17.9	57.1%
4. First Nat'l City Bk.	81	13.9	71.0%
5. Bankers Trust Co.	47	8.1	79.1%
6. Comm'l Bk. of N.A.	12	2.1	81.2%
7. Marine Midland Tr.	11	1.9	83.1%
8. Hanover Bank	10	1.7	84.8%
9. Irving Trust	10	1.7	86.5%
10. Federation Bk.	7	1.2	87.7%
11. Lafayette Nat'l Bk. 12. Morgan Guaranty Tr.	5 each	.9 each	89.5%
13. Bank of New York 14. Meadow Brook Nat'l Bk. 15. Richmond Co. Nat'l Bk. 16. Sterling Nat'l Bk. 17. United Nat'l of L. I.	4 each	.7 each	93.0
18. Merchants Bank 19. Royal State Bank 20. Trade Bk. & Tr.	3 each	.5 each	94
21. American Trust Co. 22. Atlantic Bk. of N.Y. 23. Belgian-American Bk. 24. Bensonhurst Nat'l Bk. 25. Empire Trust 26. Gotham Bank 27. Underwriters Trust	2 each	.3 each	
Subtotal	563	96.6%	
19 Remaining Banks	19	3.3	
Total All Banks	582	100 %	

[a] Total of percent column has been rounded to equal 100%.

Source: DX 64; DX 1, p. 16, and Map Index; PX 28. The figures in th exhibit are unclear and do not square with those in defenda accepted defendant's figures in most instances.

The disparity in distribution of branches manifested by the foregoing table compels the conclusion that at the time of this merger, a handful of large banks controlled a disproportionately large share of the local market.[197] Ascertainment of the level of concentration existing before the merger, however, is only part of our problem. We must also discern the trend and determine the probable impact of this merger on concentration, and ultimately the impact of concentration and this merger upon competition.

E. *The Trend.*

Clayton § 7 "prohibits a given merger only if the effect of *that* merger may be substantially to lessen competition" or tend to monopoly. *Brown Shoe Co.* v. *United States, supra,* at 332. The statute, however, "requires a prognosis of the probable *future* effect of a merger." *Ibid.* Determination of the probable future impact calls for a prediction, and a sound prediction demands a valid basis for projection.

We think it plain that in most cases a comparison of the number of firms and the level of concentration in a market at the instants immediately before and after a merger is not an adequate basis for discerning a trend. Rather, the evolution of the market structure, and the effect of its merger history over some reasonable period of time,[198] must be examined to discern whether there is a trend which is likely to result in undue concentration if a given merger is allowed to stand. *Brown Shoe Co.* v. *United States, supra,* at 332. Our quest is to dis-

197 There is no evidence as to the distribution of branches in Nassau and Westchester beyond the fact that, together, 12 Westchester banks have 104 offices and 15 Nassau banks have 96 (DX 1, Supp. Map of Metropolitan Area). The parties have stipulated in effect that 75% of retail customers are located in New York City and 25% in the metropolitan area outside the city (PX 14). Since those customers located outside the city necessarily do part of their banking business in the city, branch concentration in the city has a direct impact throughout the metropolitan area. In any event, we think the picture in the city affords a fair sample of the general picture throughout the area and provides a meaningful gauge for measuring concentration. *Cf. Brown Shoe Co.* v. *United States, supra,* at 339-42 n.69.

198 In *United States* v. *Philadelphia National Bank, supra,* the court surveyed the decade before the merger (374 U.S. at 325-26). Bok suggests a period between five to ten years prior to the merger. Bok, Mergers and the Clayton Act, 74 Harv. L. Rev. 226, 314 (1961). We think the relevant period varies with and depends on the unique history of the market under consideration.

cover whether there is a trend toward concentration and, if so, whether the trend has resulted in such concentration, or gathered such momentum, that this merger threatens to increase concentration, or to accelerate the trend, to prescribed anticompetitive proportions. *Id.* at 315, 322, 332-33.

In determining whether there has been a trend toward concentration, there must be consistency in the number of firms employed for measuring changes in the level of concentration during the historical period considered, and, in computing the percentage of increase in concentration over the period, much turns on the number of firms considered. In *Philadelphia,* the number considered in computing changes extended down the lineup of competitors only to the point necessary to include the pre-merger position of the larger firms.[199] We, therefore, employ that method and will use five banks in the local market as a basis for discerning whether there is a trend toward concentration. We think that the history of the market since the end of World War II is the relevant period to be considered here in order to understand how concentration reached the level existing before this merger and predict what the impact on concentration is likely to be as a result of this merger. We will survey the market history and ascertain whether, as a matter of fact, over the relevant period the aggregate share of the five largest firms in the local market has remained fairly consistent or has grown so disproportionately to the shares of smaller competitors as a result of mergers that it is reasonably probable that *this merger* threatens to result in concentration of proscribed anticompetitive proportions.

As we have seen, following World War II, most of the large New York banks which had previously engaged almost exclusively in wholesale banking found it necessary to enter the mass local retail market in response to adverse changes in economic conditions.[200] The pace of the change was so swift that mergers with existing retail banks,

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199 See *United States* v. *Philadelphia National Bank, supra,* at 365 n.42; Bok, Mergers and the Clayton Act, *supra,* at 313.

200 DX 10; Bogen, Tr. 427-37; Recent Bank Mergers in New York City, *supra,* p. 26 et seq.; Branch Banking, Bank Mergers and the Public Interest, *supra,* p. 163 et seq. The latter reference dramatically shows one adverse economic change. It notes that between 1940 and 1960 the population of Nassau and Westchester grew by 220% and 41%, respectively, while that of New York City increased only 4%. *Id.* at 38.

rather than slow and costly entry by internal expansion, offered the only quick and economically feasible means of acquiring a ready made branch system to generate the necessary volume. The adjustment to integrated wholesale-retail operations culminated in 27 mergers during the decade ending in 1960.

The immediate impact of most of the major mergers in the local market[201] was more vertical than horizontal, for the wholesale bank had comparatively little local business to bring to the retail bank's share. The mergers, therefore, as a practical matter, brought newcomers into the local market, and their vast resources were made immediately available to the general public and small businesses on a broad scale. While it is true that one of the banks ceased to be a separate competitor, the retail partners did not vanish from the arena, for, so far as the record reveals, no bank closed its doors or ceased operations. Rather, the mergers were followed by rapid development and internal expansion of the retail side of the business, but the resulting bank integrated its local operations with extensive nationwide and worldwide wholesale banking.

Manufacturers had a different history. It grew as a retail bank, and its position in the wholesale market was built upon the aggregate deposits of over one million customers. As a result, at the time of this merger, it was already an integrated bank. Hanover was predominantly a wholesale bank operating in the national market, but it also operated in the local market, and, six months before the merger, it had ventured into some retail banking. According to the evidence, only two remain-

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201 The government aims its heaviest guns at five out of 27 mergers which occurred in New York City during the decade beginning in 1950: (1) Chase National Bank and Bank of Manhattan Co., after the latter had absorbed Bronx County Trust Co.; (2) First National Bank and National City Bank; (3) Chemical Bank & Trust Co. and Corn Exchange Bank & Trust Co.; (4) Bankers Trust Co. and seven other banks; and (5) J. P. Morgan & Co. and Guaranty Trust Co. (PX 28; PX 9). Morgan-Guaranty was a union of two banks which had been engaged almost exclusively in wholesale banking in a nationwide market, and the resulting bank still publicly adheres to that policy. (105 Cong. Rec. 7832 (1959); N.Y. Times, May 12, 1964, p. 15). The other four earlier mergers were all investigated by the New York State Banking Department which found that they did not increase concentration significantly in the local market, either because they were unions of wholesale and retail banks, like the Chase-Manhattan merger, or because the resulting bank derived a large portion of its business from the national market, as with the resulting bank in all four mergers. Recent Bank Mergers in New York City, *supra*.

ing banks — Morgan Guaranty and Bank of New York — still continue to operate as purely wholesale banks.

Defendant argues that the government has failed to prove that any of the earlier mergers had any anticompetitive effect. It insists that earlier mergers of wholesale and retail banks have not lessened, but increased, the vigor of local competition, and have not impaired, but improved, available sources of credit for the general public and small marginal businesses. It stresses that competition among the survivors is strong and vigorous and points to uncontradicted evidence that large integrated banks do not discriminate against small borrowers or other retail customers, but make a special effort to attract and serve their needs, and, indeed, have blazed new trails in consumer credit, special checking accounts, savings accounts, small business loans, and in a broad extension of branch facilities to communities and areas which could not support their own independent bank.[202] We have no quarrel with defendant's facts, and it cannot be denied that interest rates, service charges, etc. are low.[203] Nor do we doubt that, competitive factors aside, the general public and small businesses have benefited from the mergers. Nonetheless, practices harmless in themselves, or even those conferring benefits upon the community, cannot be tolerated when they tend to create a monopoly; those which restrict competition are unlawful no matter how beneficent they may be. It is of no moment that a short-run by-product may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage to the community depends upon the removal of restraints upon competition. *Brown Shoe Co.* v. *United States, supra,* at 344; *Standard Oil Co. of California* v. *United States, supra,* at 309; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 427-28 (2d Cir. 1945); *United States* v. *Bethlehem Steel Corp., supra,* at 617-18.

Although the earlier mergers were primarily vertical in their immediate aim and effect, there can be no blinking the fact that, with the passage of time, all of them have had an impact on concentration. Necessarily, the earlier mergers and the special efforts of integrated banks to attract retail customers have brought ever-greater numbers of formerly independent banks, and more and more of the local market, into fewer and fewer hands. *Brown Shoe Co.* v. *United States, supra,* at 345.

202 DX 1, p. 28.

203 DX 1, pp. 37-39.

In 1950 there were 70 independent commercial banks in New York City.[204] During the decade 27 banks were absorbed by mergers, while only three newcomers entered the local market, and they were established by existing banks. Thus, 38.6% of the commercial banks existing in 1950 ceased to exist as independent competitors by 1960, and Manufacturers was no stranger to the process.[205] The reach for branches gathered 222 banking offices, together with all their local business, into the hands of a diminishing group of survivors.[206] As a result, in the decade preceding this merger, the general public and small businesses had been deprived of over one-third of their independent banking alternatives.

As we have seen, at the time of this merger, a handful of firms occupied 79% of the branches in the City of New York. There is no need to rely on deductive reasoning to learn how the five largest integrated banks achieved their dominant position. Hanover's former chairman tells us: "[A]ll of the five largest banks in the complete market — by that I mean the local, national and international markets — have achieved their present position through important mergers."[207]

The relative share of branches, and therefore the aggregate market share of the five largest banks did not remain consistent while they were expanding their retail operations. Their growth was not offset by growth of smaller banks or the entry of newcomers. Rather, as a result of "important mergers" and *de novo* branching, the structure of the market was altered from one of many enterprises to one of a handful of firms at the top of an inverted pyramid, with a significant, and threatening to obtain a decisive, advantage in market share. The graphs below demonstrate that there is no mistaking a strong trend toward oligopoly:

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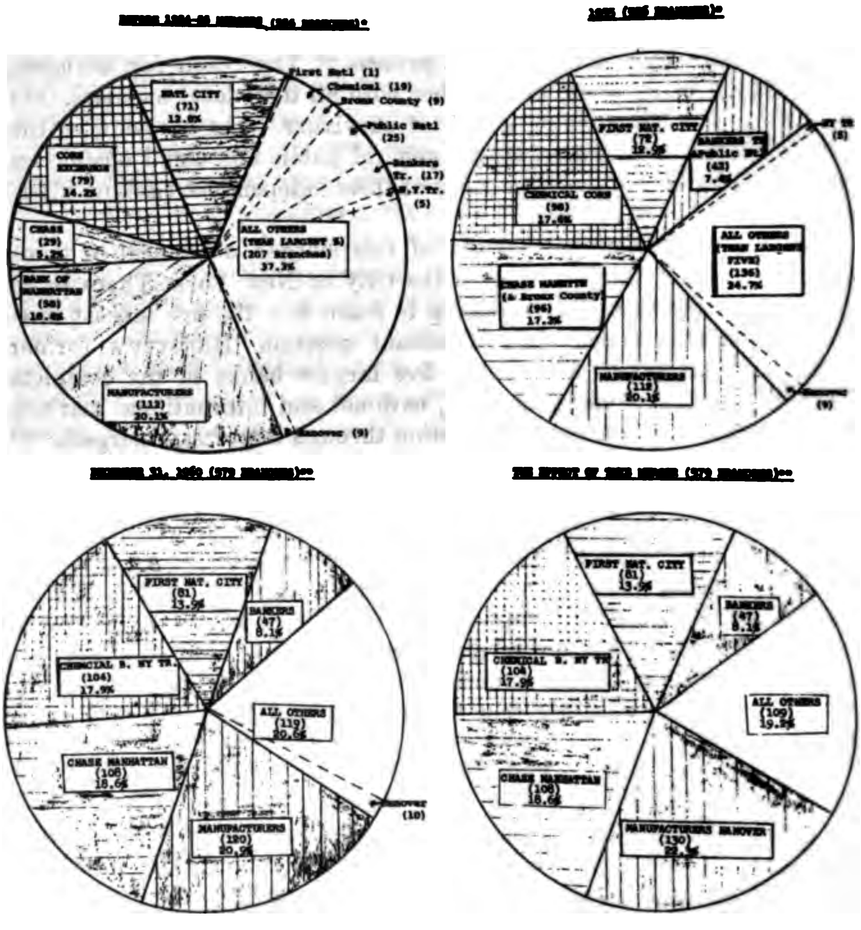
204 PX 28. Again, there are no merger figures in evidence for the whole metropolitan area, but we take notice that Nassau and Westchester have not escaped from the merger trend. Branch Banking, Bank Mergers and the Public Interest, *supra*, p. 104.

205 PX 24; DX 1, p. 3.

206 PX 28.

207 DX 10, p. 9. See also PX 28; Recent Bank Mergers in New York City, *supra*.

[illegible]



* Source: [illegible]
** Source: [illegible]

Having ascertained the level of concentration and discerned the trend toward oligopoly, we turn to consideration of whether this merger threatens to augment concentration or the trend.

F. *The Increase in concentration caused or threatened by the merger.*

The government argues that Manufacturers and Hanover were substantial competitors in both markets, and that the merger therefore significantly increased concentration and accelerated the trend by eliminating former competition between them and removing a subtantial factor from competition as a whole. Defendant admits that the constituent banks were competitors, but argues that competition between them was more complementary than competitive, and therefore the merger did not, and does not threaten to, increase concentration significantly whatever the pre-existing level or trend.

Clayton § 7, of course, applies to mergers between actual competitors even though the firms have competed directly on the horizontal level in but a fraction of the relevant product and geographic markets in which either has operated. *Cf. Brown Shoe Co.* v. *United States, supra,* at 337; *United States* v. *Bethlehem Steel Corp., supra,* at 618. The statute also bans any acquisition by one corporation of another, competitor or not, whenever the reasonable likelihood appears that the acquisition may lessen competition substantially or tend to create a monopoly. *Brown Shoe Co.* v. *United States, supra,* at 317; *United States* v. *E. I. du Pont de Nemours & Co., supra,* 353 U.S. at 592.

As we have seen, Manufacturers was a retail-wholesale bank, while Hanover was predominantly a wholesale bank. Manufacturers operated extensively in the national market and originated only a comparatively small percentage of its business in the local market. We, therefore, have no difficulty in concluding that the business of Manufacturers and Hanover in the local market was more complementary than competitive, or to put it another way, more vertical than horizontal. It does not follow, however, that competition between Manufacturers and Hanover on the horizontal plane was minimal or insignificant, or that Hanover's contribution to the vigor of local competition as a whole was insubstantial. Nor, as we have seen of earlier mergers, does it follow that this merger, in its vertical aspects, will have no impact on concentration in the local market.

A detailed comparison of the local and national business of the constituent banks, exclusive of trust services, is set forth in Appendix

A. It shows that 36,521 (91.5%) of Hanover's customers were in the local market compared to 1,264,313 (99.6%) of Manufacturers'. Hanover originated $258,383,000 (18.34%) of its deposits, and $38,686,000 (4.34%) of its loans in the local market compared to $1,383,252,000 (50.37%) and $368,810,000 (24.10%), respectively, for Manufacturers. Hanover had 424 loans aggregating $14,234,000 to small business firms who borrowed $100,000 or less, compared to 9,012 such loans aggregating $127,774,000 for Manufacturers. Hanover had 8.7% of the voluntary and court trusteeships held by New York City banks and trust companies compared to 4.9% for Manufacturers. (DX 1-Memorandum, pp. 41-42.)[208]

Although Hanover's contribution to local competition may seem small compared to Manufacturers and other large integrated banks, it does not follow that it was insubstantial. The evidence, we think, justifies an estimate that Hanover had a greater share of the local market's deposits than 48 smaller banks, and a greater share of its loans than 40 others.[209] In a market of 72 competitors, we cannot say that the competition of a bank aggressive enough to win a greater share of deposits than two-thirds of the banks in the arena was minimal, insignificant, or insubstantial. Nor can we say that it did not contribute substantially to the vigor of competition, even though the range of its retail services was limited, and its share small, relative to larger competitors. Quite the contrary. In the setting, we think, Hanover was a substantial, vigorous, and major competitor. *United States* v. *Aluminum Co. of America, supra,* at 280 et seq.; *United States* v. *First National Bank & Trust Co. of Lexington, supra,* at 671-72.

Defendant argues, however, that even though the merger eliminated former competition between the constituent banks, it did not lessen competition as a whole, but increased the vigor, by giving small businesses

208 There are no figures in evidence showing the percentage of trust business in the metropolitan area as a whole, but those for the City of New York constitute a fair sample. *Cf. Brown Shoe Co.* v. *United States, supra,* at 339-42.

209 We have largely, though not entirely, corrected the distortion of Hanover's market share by allocating its accounts (Appendix A). The correction, plus evidence that the smaller the bank the lesser the distortion of the spurious statistics, permit our estimate. *Cf. United States* v. *Philadelphia National Bank, supra,* at 364 n.40. Compare Hanover's deposits and loans allocable to the local market with the total deposits and loans of smaller banks shown in Appendix B and in DX 64. Compare the number of Hanover's branches with the number held by smaller competitors, *supra,* at p. 200.

and other retail customers not one less, but one more, practical banking alternative. Defendant points to evidence that before the merger Hanover offered no savings accounts whatever compared to 465,221 for Manufacturers. Since the merger, 7,479 new savings accounts have been opened at former Hanover offices (DX 58). Hanover did not have a special checking account service until April 1960, and six months later, at the time of the merger, Hanover had developed only 4,280 special checking accounts, and 2,953 of them were accounts of its own employees (DX 5). Against this, Manufacturers had 250,021 special checking accounts (Appendix A). Since the merger, the number of special checking accounts at former Hanover banking offices has increased to 5,477, exclusive of employee accounts (DX 58). Until April 1960 Hanover did not offer a consumer installment loan service and only had 927 such loans at the time of the merger compared to 189,460 for Manufacturers (Appendix A). By July 25, 1963 the number of such loans at former Hanover offices had increased to 3,491 (DX 5).

There can be no question that one of the immediate effects of the merger was that small customers gained a practical, though not an independent, banking alternative to the extent that Hanover instituted personal banking services where previously it had none.[210] It cannot be gainsaid, however, that customers lost an actual and substantial banking alternative to the extent that services previously offered by Hanover duplicated those offered by Manufacturers and other competitors. Small business loans, single payment loans to individuals, IPC demand deposits under $100,000, and trust services loom large in that anticompetitive effect.[211]

More significantly, customers lost a potential banking alternative, for even though Hanover had a long tradition as a wholesale bank, it already had 10 branches—more than 37 other rivals in the city—,[212] ample resources to acquire more, and the same economic motivations which had pressed other wholesale banks to integrate operations and expand into the mass retail market.[213] That it was sufficiently aggressive and in a position to respond to the urge appears clear.[214] Indeed, it had

210 DX 1-Memorandum, p. 12.

211 DX 1, pp. 33, 40, and 41; Apendix A.

212 See p. 200 *supra.*

213 DX 10, pp. 24-25.

214 DX 10, pp. 15 and 24.

already established the nucleus of a personal banking department in 1960. True as a late arrival in the mass market it had made relatively little headway against the encircling branches of entrenched competitors,[215] but during the six months before the merger, it had developed enough retail business to show some promise. Opportunities to exploit its advantages were on its doorstep. Its branches were located in areas of tremendous population density. Some 38,700 people could have banked with Hanover without leaving the buildings in which they worked, another 1,125,000 potential customers swarmed in the area of its 10 branches, and growth projections for the area were impressive.[216] Hanover would, of course, as Manufacturers' chairman put it, face "tremendous obstacles" in expanding its branch system internally to generate a volume remotely approaching that held by integrated banks like Manufacturers. "Principal among these would be the difficulties of finding new locations, the enormous capital investment required, and the lack of trained personnel."[217] An underlying premise of the Clayton Act, however, is that internal expansion is more healthy for the economy than expansion by merger. *United States* v. *Philadelphia National Bank, supra,* at 370; *Brown Shoe Co.* v. *United States, supra,* at 345 n.72.

Surely we are not to suppose that a bank which at the end of six months' experience was so enthusiastic about retail banking that it swallowed 120 branches in one gulp, was not ready, able, and eager to exploit its present advantages, as well as expand its own branch system internally, if it had not acquired the lion's share of the market's branches by merger. Any such prediction is precluded by defendant's own witnesses who were emphatic that the future of commercial banking lies in the local retail market, and it is plain that Hanover had made the same forecast.[218]

215 The 10 former Hanover branches are encircled by 65 competing commercial banks, exclusive of 14 former Manufacturers branches, and in the immediate vicinity of each pair of former Manufacturers and Hanover branches, there are at least 12 offices of competitors, all offering a broad range of retail banking services to the general public and small businesses. DX 1-Supp. Map.

216 DX 1, p. 26; DX 10, p. 16.

217 DX 10, pp. 14-15 (Flanigan).

218 DX 10, p. 24 (Gray): "The trend and the future of banking in New York City, and in other financial centers, lies in fully integrated banks offering both retail and wholesale services to all members of the banking public. The retail function complements the wholesale function in the modern bank because it provides a broad, fairly constant base for deposit growth."

Hanover was no feeble, obscure, struggling newcomer. It had been in New York for almost a century. It had vast resources, enjoyed great prestige, enormous good will, and public confidence.[219] It was doing well on its own, and there was no need to merge.[220] The independent existence of a well-equipped, well-financed, well-known, old, and thriving competitor, already established in the local market and threatening to expand into the coveted mass market, is a powerful and substantial stimulant to the vigor of competition. *United States* v. *Penn-Olin Chem. Co., supra; United States* v. *El Paso Natural Gas Co., supra.* Indeed, defendant insists that competition before the merger was more vigorous in New York than anywhere else in the country. We think it plain that Hanover's contribution to the vigor was substantial, both actually and potentially.

Viewed vertically, as defendant urges, the long-range impact on concentration and the vigor of competition threatened by the merger is not better, but worse. In vertical perspective, one of the market's foremost retail banks acquired the resources (production facilities) of one of the nation's foremost wholesale banks, while the wholesale bank acquired an additional 120 branches (loan outlets and deposit inlets). *Cf. Brown Shoe Co.* v. *United States, supra,* at 345, and at 367 (Harlan, J., concurring). The combined resources can be used interchangeably in either market and shifted from one to the other in response to opportunities. That, of course, was the self-evident reason for the merger. The chairmen of both banks laid bare their plans to use the combined resources for that purpose in both markets and to convert Hanover's branches immediately to broad scale retail operations.[221] The plans were carried out; former Hanover offices have developed retail business at a mounting rate, as we have seen, and they will continue to do so.[222] Thus, the reasonable probabilities are that more and more of the local market will be gathered into still fewer hands by this merger.

As a result of this merger, 80.7% of the branch banking offices in New York City were concentrated into the hands of the five largest integrated banks. While the percentage of increase in branch concentration caused by the merger was only 2.15%, the factual setting admits

219 DX 1, pp. 3-9, 28.

220 DX 10, p. 35 (Gray): "I don't think, Governor, we have to make this proposed merger. We can both do well on our own. But I think we will do better in the merged institution than we will separately, both of us."

221 DX 10, pp. 15, 24, and 35.

of no conclusion other than that this merger significantly increases concentration. *United States* v. *Aluminum Co. of America, supra.* We proceed to the question of whether it will accelerate the trend toward oligopoly.

G. *The Impact of this Merger on the Trend.*

This merger gathered into still fewer hands 10 more branches, over $38 million in local loans, and over $250 million in local deposits. Since this merger, there have been seven others, and four of the banks eliminated were acquired by four of the six largest banks in New York City. As a result of these later mergers, 18 more offices were absorbed along with over $200 million in assets. The customers' loss of independent banking alternatives had mounted, as of September 1963, to 44% of the competitors existing in the local market at the beginning of 1950.

Against this, since the merger, two new banks have opened, three other applications are pending, and 13 foreign banks have established 15 full service branches. Witnesses from some of the foreign banks testified, but there was no testimony or other evidence that any of them had gotten off the ground in the local market. Flushing National Bank of Queens, the only entirely new bank to open in the city since 1950, commenced operations December 31, 1962, and after eighteen months had wrested only 0.015% of the market's assets from entrenched competitors. The other newcomer, County National Bank, located in Nassau, did worse; it scratched out 0.003% (DX 56).

Since the merger, the market share of the five largest banks has declined according to the spurious statistics.[223] We think, however, that the decline probably reflects lost ground in the national market,

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222 DX 1, p. 27; DX 1-Memorandum, pp. 12-13.

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DECLINE SINCE THE MERGER IN THE SPURIOUS PERCENTAGES OF ASSETS, DEPOSITS AND LOANS OF THE FIVE LARGEST BANKS LOCATED IN THE METROPOLITAN AREA (DX 66).

	Assets	*Deposits*	*Loans*
Dec. 31, 1960	71.1%	70.8%	72.3%
Dec. 31, 1961	70.6%	69.4%	70.3%
Dec. 31, 1962	70.1%	68.7%	70.5%
Dec. 31, 1963	70.4%	69.5%	71.2%
June 30, 1964	70.8%	70.2%	71.1%

but, in any event, the decline is an ebbing ripple against a flood tide toward oligopoly.

Despite the post-merger facts, defendant argues that this merger does not threaten to trigger others. It points to uncontradicted testimony that there are only two purely wholesale banks left in New York and to evidence that there are no remaining retail banks in the city with extensive branch systems. Defendant argues that these commercial realities speak against future mergers for the purpose of entering into, or integrating wholesale operations with, the local market. That argument flaunts the reasons for the present merger. If Hanover can merge with Manufacturers, either of the other wholesale banks can, with equal logic, merge with any of the integrated banks. More significantly, if Hanover was pressed to merge in order to get into full scale retail operations, surely this merger puts added pressure on smaller banks to do the same thing. The argument also ignores the urge to merge in order to follow customers into the suburbs where the mere presence of branch systems tempts easy cross-branching by merger.

Finally, defendant argues that the New York omnibus banking law and the federal Bank Merger Act of 1960 were enacted to check future mergers which might have an anticompetitive effect, and that we ought not speculate that the agencies entrusted with their administration will ignore their duties, or that, if they do, the Department of Justice will allow bank mergers to go unchallenged now that *Philadelphia* and *Lexington* have subjected them to the full thrust of the antitrust laws.

We are mindful that in the decade 1950-1960, the Department of Justice, like Congress, the federal banking agencies, and most of the legal profession, believed that Clayton § 7 did not apply to bank mergers accomplished by the acquisition of assets,[224] and there was doubt as to the applicability of the Sherman Act.[225] The applicability of the antitrust laws, however, had not been authoritatively determined by

224 See *United States* v. *Philadelphia National Bank, supra,* at 373 (Harlan, J., dissenting) & at 396 (Goldberg, J., dissenting).

225 Repugnancies lurking in the Bank Merger Act fed doubt as to the applicability of the Sherman Act. *McCulloch* v. *Maryland,* 17 U.S. [4 Wheat.] 316 (1819). See also *Toolson* v. *N.Y. Yankees,* 346 U.S. 356 (1953); *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944); *Transamerica Corp.* v. *Board of Governors, supra,* at 206 F. 2d 166.

the Supreme Court. Now that *Philadedlphia* and *Lexington* have removed all doubt as to the applicability of both Clayton § 7 and Sherman § 1 to bank mergers, we share defendant's confidence that if the banking agencies do approve any anticompetitive mergers, the Department of Justice will promptly bring suit to enjoin them. Nevertheless, we cannot conceive how the banking agencies or the court could fairly withhold approval of any future merger of smaller banks if this one were allowed to stand. However, the facts with respect to any future mergers, the need for them, the reasons for them, and their probable competitive effects are not before us. Our concern is not with speculation about the competitive effect of the next merger, but with a rational judgment of the probable effect of this one.

This merger offends Clayton § 7 in so many ways that to allow it to stand would be to ignore the statute altogether. It tends to create a monopoly by significantly increasing concentration and accelerating a trend toward oligopoly. The case more than satisfies the rule that where concentration is already great, even slight increases must be prevented. *United States* v. *Aluminum Co. of America, supra,* at 280; *United States* v. *Philadelphia National Bank, supra,* at 367 n.43; *Brown Shoe Co.* v. *United States, supra,* at 334. It also runs afoul of the principle that where there is a strong trend toward oligopoly, further tendencies in that direction are to be curbed in their incipiency, whatever the number, or vigor, of remaining competitors. *United States* v. *Continental Can. Co., supra,* at 461; *United States* v. *Philadelphia National Bank, supra,* at 367 n.43; *Brown Shoe Co.* v. *United States, supra,* at 333, 345-46.

The merger substantially lessens competition and restrains trade by the permanent elimination of significant competition formerly existing between major competitors, and that in "itself constitutes a violation of § 1 of the Sherman Act," and, *a fortiori,* of the Clayton Act. *United States* v. *First National Bank & Trust Co. of Lexington, supra,* at 671-72. It substantially lessens the vigor of competition as a whole for it not only eliminated a substantial and vigorous competitor from actual and potential competition, but also removed one of a few remaining competitors capable of challenging the dominant position of the five largest banks and threatening to intensify the struggle. *United States* v. *Continental Can Co., supra,* at 461; *United States* v. *Penn-Olin Chem. Co., supra,* at 170; *United States* v. *El Paso Natural Gas Co., supra,* at 658-62. It permanently deprives customers of a substantial and important banking alternative, thereby impairing the ability of small

businesses and other retail customers to bargain for better terms. It is no answer to such a loss that large banks make a special effort to serve small customers, for, whatever the special effort, one branch of the same bank does not compete with another. *United States* v. *Philadelphia National Bank, supra,* at 369. Nor is it any answer that competition among surviving competitors is vigorous, for the more that individual firms coalesce, the greater the likelihood that a coalition and parallel policies of mutual advantage will emerge from the ashes of competition. *United States* v. *Aluminum Co. of America, supra,* at 280; *United States* v. *Philadelphia National Bank, supra,* at 367 n.43.

Finally, in the setting, this merger significantly increases concentration and speeds the trend toward oligopoly. There is no need to rely on a crystal ball to predict the probable future effect of the merger upon concentration and the probable impact of increased concentration upon competition. Hanover's plight and fate, the scarcity of newcomers since 1950, and the insignificant shares wrested from entrenched competitors by late arrivals, bear telling witness to the dimmer prospects which will confront newcomers attempting to establish a foothold, the heightened obstacles to growth of smaller banks by internal expansion, and the added pressure on them to leave the market by merger.

The level of concentration and momentum of the trend resulting from earlier "important mergers" demonstrate, we think, that one more "important merger" is too much for a market structure already close-hauled. In the circumstances, this merger creates a clear and imminent threat that a handful of banks are likely to sew the local market up tight unless we call a halt. We think it clear that the merger threatens to result in five firms with a decisive advantage in the competitive struggle, with inert power to impair the opportunities for new firms to enter into, and smaller firms to remain in, the market. A merger which imminently threatens to create inert power in so few, collectively, even though not collusively, to exclude competitors, restrict growth of rivals, and squeeze smaller firms out of the market, is a combination in unreasonable restraint of trade violative of § 1 of the Sherman Act. *Federal Trade Comm'n* v. *Motion Picture Advertising Serv. Co.,* 344 U.S. 392, 395 (1953). *Cf. Tampa Electric Co.* v. *Nashville Coal Co., supra,* at 328; *Standard Oil Co. of California* v. *United States, supra,* at 309; *United States* v. *E. I. du Pont de Nemours & Co., supra,* 351 U.S. 389-93; *American Tobacco Co.* v. *United States,* 328 U.S. 781, 811 et seq. (1946); *United States* v. *Aluminum Co. of America, supra,*

148 F. 2d 427-32. *A fortiori,* such a merger tends to create a monopoly violative of § 7 of the Clayton Act. *Brown Shoe Co.* v. *United States, supra,* at 328-29.

We conclude, therefore, that the government has sustained its burden of proof, and that the merger violates both Clayton § 7 and Sherman § 1 in the local market as defined herein. We turn to determination of the competitive effect of the merger in the national market.

H. *The Effect of the Merger in the National Market.*

Competitive power, strength, and position in the national market depend on lending limits which, in turn, depend on deposits.[226] Our statistics (Appendix C), though spurious as to relative shares of the national market, are genuine as to total deposits and, therefore, demonstrate the true relative position, power, strength, and vigor of the national competitors.

There can be no question that Manufacturers and Hanover were in substantial competition with each other in the national market and that both were vigorous, substantial, and major factors in competition generally. That conclusion is overwhelmingly demonstrated by a cursory comparison of the national business of the constituent banks which is set forth in Appendix A,[227] and by a comparison of their deposits, relative to those of the 199 remaining competitors, which is set forth in Appendix C. It is reinforced by the opinions of all of the banking agencies which clearly recognized that both banks engaged in wholesale banking in a nationwide area of effective competition. The merger, therefore, permanently eliminated substantial competition existing between major competitors and permanently removed a substantial competitor and a significant lead bank from competition as a whole.

These findings of fact raise the question of whether the mere elimination of former competition between Manufacturers and Hanover, without regard to other factors, violates Clayton § 7 and Sherman § 1.

The government argues that since the competition between Manufacturers and Hanover was substantial, the permanent elimination of that competition by merger necessarily results in a substantial lessening of competition and, therefore, violates Clayton § 7. In support of

226 DX 10.

227 There was also direct competition. The banks had 372 common depositors accounting for approximately $1,000,000 and 67 common borrowers accounting for $361,760. DX 1, p. 33.

its contention, the government relied originally on *United States* v. *Koppers Co.*, 202 F. Supp. 437 (W.D. Pa. 1962), and *United States* v. *Bethlehem Steel Corp., supra.* We think, however, that neither case stands for the proposition that the mere elimination of substantial competition between parties to a merger is itself a violation of Clayton § 7.

Clayton § 7, prior to its amendment in 1950, focused upon the elimination of competition between the merging firms by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired company.[228] The courts, however, steadfastly refused to find a violation, even under old Clayton § 7, merely on the basis of the elimination of competition formerly existing between competitors.[229] The legislative history of the 1950 amendment to Clayton § 7 itself refutes the government's theory.[230] Significantly, during debate on the 1950 amendment, Senator Kefauver, a co-sponsor of the bill, said that a merger "would not be illegal merely because of the elimination of the competition which had previously existed between the acquiring and acquired firms. That is to say, within the section [of the country], the merger would have to have the effect of lessening competition generally."[231]

Defendant's position is supported by *Tampa Electric Co.* v. *Nashville Coal Co., supra,*[232] and the government's theory definitively re-

228 *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593 (1951); *United States* v. *Paramount Pictures, Inc.,* 344 U.S. 131 (1948); *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553 (1936); *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927).

229 *American Crystal Sugar Co.* v. *Cuban-American Sugar Co., supra,* at 526, and cases there cited.

230 "While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies." S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950).

231 96 Cong. Rec. 16456 (1950). See also H.R. Rep. No. 1191, p. 7; 96 Cong. Rec. 16435; 95 Cong. Rec. 11487 (1949).

232 "To determine substantially in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." (365 U.S. 329.)

jected by the Supreme Court in *Brown Shoe Co.* v. *United States, supra,* where the court said:

> "Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. Section 7 of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies. *The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally* in an economically significant market." 370 U.S. 335 (emphasis added).

Finally, even *Philadelphia,* upon which the government so heavily relies, teaches that the competitive effect of a merger must be judged, not merely on the basis of the elimination of former competition between the merging banks, but on the basis of a firm understanding of the structure of the relevant market. Thus, the text of the statute, its legislative history, and authoritative interpretations by the Supreme Court, make clear that the critical question under Clayton § 7 is whether the merger may substantially lessen competition or tend to create a monopoly when its effects are assessed within the structure and history of the whole relevant market.[233] However, all of the cases on which defendant relies were decided before *United States* v. *First National Bank & Trust Co. of Lexington, supra,* and we must reckon with the Supreme Court's latest ruling on the question.

The government argues that *Lexington* compels a decision that the mere elimination of former substantial competition between major competitors is *per se* a violation of Sherman § 1 and, therefore, necessarily offends Clayton § 7. Defendant, relying on *United States* v.

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233 This is not to say that forbidden anticompetitive effects may not be perceived from the elimination of former substantial competition between major competitors, or from the elimination of a substantial factor from competition as a whole, when a merger's impact is assessed in the setting in which those factors are placed. Handler and Robinson, A Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Colum. L. Rev. 629 (1961).

Columbia Steel Co., supra, and a line of earlier cases,[234] contends that the government's position is unsound as a matter of law, that we must assess the competitive effect of the merger in its setting, and determine its probable effect on competition in the whole structure of the relevant market, particularly the number, vigor, and strength of remaining competitors.

There can be no question that in *Columbia Steel* the Supreme Court held that the validity of a horizontal merger under Sherman § 1 depended on an assessment of many factors other than the mere cessation of competition between former competitors. The teaching of the case is:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." 334 U.S. 527-28.

Looking to the factors specified in *Columbia Steel,* we find: the dollar volume great, but not of compelling significance; defendant does not control an undue, dominant, or decisive share of the national market;[235] the merger springs from legitimate business requirements to enable defendant to satisfy the credit needs of very large customers and to compete more vigorously as a lead bank against larger competitors;[236] there is no purpose to monopolize, curtail competition, or control prices; the structure of the national market is one of many

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234 In addition to a series of decisions in lower federal courts, defendant cites: *Times-Picayune Pub. Co.* v. *United States, supra; Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933); *United States* v. *United States Steel Corp., supra; Chicago Board of Trade* v. *United States,* 246 U.S. 231 (1918); *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1911); *Standard Oil Co. of New Jersey* v. *United States, supra.*

235 Appendix C.

236 DX 10.

enterprises, none of which has any significant advantage over its next smaller competitor;[237] newcomers abound;[238] the relative aggregate
1960, and 1963 (DX 61).
share of the six largest banks has remained fairly consistent since 1950 and has declined since the merger;[239] the market is not oligopolistic,

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237 See Appendices C and E.

238 Compare low bank's deposits and number of competitors listed in 1950,

239 PERCENTAGE OF ASSETS, DEPOSITS AND LOANS OF THE SIX LARGEST, OUT OF 200 LARGEST, BANKS IN THE UNITED STATES.*

	Assets	*Deposits*	*Loans*
Dec. 31, 1950	27.99%	27.81%	32.50%
Dec. 31, 1960	28.89%	29.30%	30.82%
Post-Merger (pro forma)	30.34%	30.80%	32.20%
Dec. 31, 1963	30.43%	30.18%	31.50%

* Computations based on DX 61. See Apendix C.

Compare:

RELATIVE IMPORTANCE OF THE LARGEST COMMERCIAL BANKS IN CONTINENTAL UNITED STATES, DECEMBER 31, SELECTED YEARS, 1920-1958

Bank Group	*1920*	*1929*	*1934*	*1940*	*1949*	*1958*
All commercial banks						
Number	30,444	24,287	15,518	14,477	14,156	13,499
Deposits (millions)	$35,947	$51,282	$40,060	$65,431	$145,174	$215,995
Largest 100 banks						
Percent of number of all commercial banks	0.33%	0.41%	0.64%	0.69%	0.71%	0.74%
Deposits (millions)	(1)	$21,506	$21,462	$37,081	$64,611	$98,731
Percent of deposits of all commercial banks	(1)	41.9%	53.6%	56.7%	44.5%	45.7%
Largest 10 banks						
Deposits (millions)	$3,481	$8,400	$9,169	$17,244	$27,505	$42,939
Percent of deposits of all commercial banks	9.7%	16.4%	22.9%	26.4%	18.9%	19.9%
Largest bank						
Deposits (millions)	$699	$1,314	$1,629	$3,466	$5,656	$9,928
Percent of deposits of all commercial banks	1.9%	2.6%	4.1%	5.3%	3.9%	4.6%
Largest ½ of 1 percent of the banks						
Number of banks	152	121	78	72	71	67
Deposits (millions)	(1)	$22,555	$20,135	$34,159	$58,519	$87,833
Percent of deposits of all commercial banks	(1)	44.0%	50.3%	52.2%	40.3%	40.4%
Largest 1/10 of 1 percent of the banks						
Number of banks	30	24	16	14	14	13
Deposits (millions)	(1)	$13,315	$11,897	$20,360	$32,607	$48,305
Percent of deposits of all commercial banks	(1)	26.0%	29.7%	31.1%	22.5%	22.4%

(1) Not available.

Source: Annual Report of the F.D.I.C. for the Year Ended December 31, 1960, p. 51, Table 26.

and this merger does not threaten monopoly or oligopoly;[240] the government has failed to prove a merger trend toward concentration in the national market;[241] small competitors flourish; and the national market and number of competitors is growing by leaps and bounds.[242] Defendant's increased lending limits reduced the advantage of the three larger competitors, but handicapped smaller competitors (DX 1-Memorandum, p. 10), though the advantage over smaller competitors did not threaten to become decisive, for the Federal Reserve Board found that the pro-competitive effect outweighed the anticompetitive effect *in the same market*. We incline to agree. See Appendix E.

There is neither need nor purpose, however, to consider or determine whether the *Columbia Steel* factors just enumerated offset the anticompetitive effect resulting from the elimination of substantial competition between major competitors, the elimination of a substantial factor from competition as a whole, and the customers' loss of an important alternative lead bank. That course has been foreclosed by *Lexington*, where the Supreme Court held that the *Columbia Steel* case must be confined to its special facts, and that "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, *itself* constitutes a violation of § 1 of the Sherman Act." 376 U.S. at 672 (emphasis added). This case falls squarely within that rule.

Defendant argues that the market facts in *Lexington* and those in the old railroad cases on which Lexington relies,[243] have no relevance to the market facts here, and that the elimination of one out of six

240 The combined spurious share of the six largest banks in the national market is not remotely close to the figures in *Philadelphia, Lexington, Alcoa,* or *Continental Can,* nor to those considered oligopolistic by the Congress. H.R. Rep. No. 1191, p. 2. The percentages of increase in concentration on the basis of the spurious figures the instants before and after the merger were 5.12% in assets, 5.02% in deposits, and 4.51% in loans (computed from DX 61).

241 The facts detailed earlier demonstrate that the government's reliance on the total number of mergers in the entire country during the decade beginning in 1950 is misplaced, for the evidence establishes overwhelmingly that only a relatively few of the nation's large banks compete in the national market.

242 Compare growth of lowest bank from 1950 to 1963 (DX 61).

243 *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904); *United States* v. *Union Pac. R.R. Co.,* 226 U.S. 61 (1912); *United States* v. *Reading Co.,* 253 U.S. 26 (1920); *United States* v. *Lehigh Valley R.R. Co.,* 254 U.S. 255 (1920).

48-140 O—65——38

competitors may very well constitute an unreasonable restraint of trade, but that no such restraint is inherent in the mere elimination of one out of at least 200 competitors, particularly where the merger has not resulted in anything like a dominant 50% market share and does not threaten monopoly or oligopoly.

Defendant also argues that four of the Justices in *Lexington* were unwilling to predicate decision solely upon the factor of the elimination of competition between the parties to the merger, and that even the majority relied also on the presence of the other factors specified in *Columbia Steel*. Defendant urges that if the Sherman Act were so easily satisfied, there was no need to enact even the original Clayton § 7, and refers us to the legislative history of amended Clayton § 7 which shows that Congress intended to make the test of illegality under Clayton § 7 easier than under Sherman § 1. The argument proceeds that it is anomolous to apply an easier test under the Sherman Act than would be warranted under the Clayton Act. In that connection, defendant points to *United States* v. *Penn-Olin Chem. Co., supra,* decided under Clayton § 7 and after *Lexington,* where the Supreme Court, in remanding the case, directed the district court to observe a number of factors in assessing the probability of a substantial lessening of competition, including "the number and power of the competitors in the relevant market" (378 U.S. at 177). Whatever the merits of defendant's arguments, they are addressed to the wrong forum, for we must apply the Sherman Act as it is interpreted, and in accordance with rules enunciated, by the Supreme Court.

We hold, therefore, that the elimination of substantial competition previously existing between the parties to this merger in the national market itself constitutes an unreasonable restraint of trade, violative of § 1 of the Sherman Act, and, *a fortiori,* establishes a reasonable probability of a substantial lessening of competition, violative of § 7 of the Clayton Act.

CONCLUSIONS

1. This court has jurisdiction to determine the cause.

2. The approval of the merger by the Board of Governors of the Federal Reserve System is not a final and exclusive determination of its legality.

3. The merger of Manufacturers and Hanover is a combination in restraint of trade in commercial banking in the New York metropolitan area, as defined herein, and in the United States, in violation of Section 1 of the Sherman Act.

4. There is a reasonable probability that the merger of Manufacturers and Hanover may substantially lessen competition or tend to create a monopoly in commercial banking in the New York metropolitan area, as defined herein, and in the United States, in violation of Section 7 of the Clayton Act.

The foregoing opinion, footnotes, and Appendices constitute the court's findings of fact and conclusions of law, as required by Rule 52(a), Fed. R. Civ. P., 28 U.S.C. Both sides have submitted numerous proposed findings of fact, many of which we find inconsistent with our findings, irrelevant, immaterial, bad in form, or not supported by the evidence. We, therefore, reject all of them except to the extent that they are embodied within this opinion.

The parties may submit a reasonable number of further findings of fact within twenty (20) days from the filing of this opinion, in accordance with, and supplemental to, but not inconsistent with, this opinion.

All pending motions to strike opinion evidence and conclusions respecting the competitive effect of the merger are granted, except as to the opinions of the banking agencies. All other motions to strike are denied, as is the motion to dismiss the complaint.

If the parties are able, within ten (10) days, to agree on appropriate relief and the form of the decree to be entered, a decree may be submitted for our consideration, otherwise either party may apply to the court, by notice of motion, within ten (10) days from the filing of this opinion, and the court will set a time and conduct hearings to determine the equitable relief necessary and appropriate in the public interest to eliminate the effects of the merger offensive to Section 1 of the Sherman Act and Section 7 of the Clayton Act.

Dated: New York, N. Y.
March 10, 1965

LLOYD F. MACMAHON
United States District Judge

APPENDIX B

DISTRIBUTION OF ASSETS, DEPOSITS, AND LOANS OF ALL COMMERCIAL BANKS LOCATED IN METROPOLITAN AREA (DECEMBER 31, 1960)

Banks Ranked by Size of Assets	Total Assets Amount+	Total Assets Percent*	Total Deposits Amount+	Total Deposits Percent*	Total Loans Amount+	Total Loans Percent*
1. Chase Manhattan Bank	$ 8,936,066	20.25%	$ 7,477,333	20.01%	$ 4,409,905	21.09%
2. First National City Bank	7,792,429	17.65	6,570,777	17.59	3,749,840	17.93
3. Chemical Bank New York Trust Co.	4,439,771	10.06	3,798,313	10.16	2,186,350	10.45
4. Morgan Guaranty Trust Co.	4,245,233	9.62	3,409,529	9.12	2,262,615	10.82
5. Manufacturers Trust Co.	3,845,364	8.71	3,453,329	9.24	1,540,092	7.36
6. Bankers Trust Co.	3,350,052	7.59	2,919,682	7.81	1,517,321	7.25
7. Irving Trust Co	2,250,375	5.09	1,994,294	5.33	976,134	4.66
8. Hanover Bank	2,156,415	4.88	1,736,446	4.64	948,427	4.53
9. Franklin National Bank	789,575	1.78	721,935	1.93	467,586	2.23
10. Marine Midland Trust Co.	770,344	1.74	678,231	1.81	339,778	1.62
11. Bank of New York	694,891	1.57	605,979	1.62	295,630	1.41
12. Meadow Brook National Bank	586,376	1.32	532,878	1.42	342,385	1.63
13. County Trust Co.	521,947	1.18	481,869	1.29	304,143	1.45
14. Savings Bank Trust Co.	254,447	0.57	203,550	0.54	9,491	0.04
15. Empire Trust Co.	231,629	0.52	196,859	0.52	115,458	0.55
16. Grace National Bank	231,054	0.52	206,038	0.55	106,973	0.51
17. United States Trust Co. of New York	228,448	0.51	189,056	0.50	110,756	0.52
18. National Bank of Westchester	227,332	0.51	215,853	0.57	106,717	0.51
19. Federation Bank & Trust Co.	218,066	0.49	200,067	0.53	97,057	0.46
20. Commercial Bank of North America	189,755	0.43	170,993	0.45	97,361	0.46
21. Sterling National Bank & Trust Co.	167,393	0.37	151,082	0.40	99,188	0.47
22. First National City Trust Co.	164,026	0.37	122,439	0.32	4,562	0.02
23. Trade Bank & Trust Co.	121,336	0.27	112,131	0.30	58,445	0.27
24. Long Island Trust Co.	110,661	0.25	100,024	0.26	54,499	0.26
Subtotal	$42,522,985	96.37%	$36,248,687	97.05%	$20,200,713	96.61%
Total 48 Remaining Banks	1,602,792	3.63	1,102,799	2.95	708,642	3.39
Total All Banks	$44,125,777	100.00%	$37,351,486	100.00%	$20,909,355	100.00%

\+ 000 omitted.

* Total percentages do not represent actual total of columns due to rounding. Differences between totals shown and actual totals are in every case less than 1%.

Source: DX 64.

APPENDIX D

STRUCTURE OF THE LOCAL MARKET ACCORDING TO SPURIOUS STATISTICS (DECEMBER 31, 1960)*

Before Merger			After Merger		
Bank No.	Name of Bank	Deposits (Largest Share Equals 100)	Bank No.	Name of Bank	Deposits (Largest Share Equals 100)
1	Chase Manhattan Bk.	(20.01%) 100	1	Chase Manhattan Bk.	(20.01%) 100
2	First Nat'l City Bk.	87.9	2	First Nat'l City Bk.	87.9
3	Chemical Bk. N.Y.	50.8	3	Manufacturers Hanover	69.4
4	Manufacturers Tr.	46.2	4	Chemical Bk. N.Y.	50.8
5	Morgan Guaranty Tr.	45.6	5	Morgan Guaranty Tr.	45.6
6	Bankers Trust Co.	39.0	6	Bankers Trust Co.	39.0
7	Irving Trust Co.	26.6	7	Irving Trust Co.	26.6
8	Hanover Bank	23.2	8	Franklin Nat'l Bk.	9.6
9	Franklin Nat'l Bk.	9.6	9	Marine Midland Tr.	9.0
10	Marine Midland Tr.	9.0	10	Bank of New York	8.1
11	Bank of New York	8.1	11	Meadow Brook Nat'l Bk.	7.1
12	Meadow Brook Nat'l Bk.	7.1	12	County Trust Co.	6.4
13	County Trust Co.	6.4	13	Nat'l Bk. of W'chtr.	2.8
14	Nat'l Bk. of W'chtr.	2.8	14	Grace Nat'l Bk.	2.7
15	Grace Nat'l Bk.	2.7	15	Savings Bk. Tr.	2.7
16	Savings Bk. Tr.	2.7	16	Federation Bk. & Tr.	2.6
17	Federation Bk. & Tr.	2.6	17	Empire Trust Co.	2.6
18	Empire Trust Co.	2.6	18	United States Trust	2.5
19	United States Trust	2.5	19	Comm'l Bk. of N. Amer.	2.2
20	Comm'l Bk. of N. Amer.	2.2	20	Sterling Nat'l Bk.	2.0
21	Sterling Nat'l Bk.	2.0	21	First Nat'l City Tr.	1.6
22	First Nat'l City Tr.	1.6	22	Trade Bank & Trust	1.5
23	Trade Bank & Trust	1.5	23	Long Island Trust Co.	1.3
24	Long Island Trust Co.	1.3	24	Lafayette Nat'l Bank	1.0
	Subtotal	484.0		Subtotal	485.0
25-72	48 Other Banks	15.4	25-71	47 Other Banks	14.4
	Total All Banks	499.4		Total All Banks	499.4

* Source: DX 64.

APPENDIX E

STRUCTURE OF THE NATIONAL MARKET ACCORDING TO SPURIOUS STATISTICS (DECEMBER 31, 1960)+

Before Merger			After Merger		
Bank No.	Name of Bank	Deposits (Largest Share Equals 100)	Bank No.	Name of Bank	Deposits (Largest Share Equals 100)
1	Bank of America	(8.31%) 100	1	Bank of America	(8.31%) 100
2	Chase Manhattan Bk.	75.3	2	Chase Manhattan Bk.	75.3
3	First Nat'l City Bk.	70.6	3	First Nat'l City Bk.	70.6
4	Chemical Bk. N.Y.	36.1	4	Manufacturers Hanover	49.5
5	Morgan Guaranty Tr.	33.7	5	Chemical Bk. N.Y.	36.1
6	Manufacturers Tr.	32.0	6	Morgan Guaranty Tr.	33.7
7	Security First Nat'l	30.4	7	Security First Nat'l	30.4
8	Bankers Trust Co.	28.0	8	Bankers Trust Co.	28.0
9	First Nat'l, Chicago	25.7	9	First Nat'l, Chicago	25.7
10	Continental-Illinois	23.0	10	Continental-Illinois	23.0
11	Wells Fargo Bk.	22.7	11	Wells Fargo Bk.	22.7
12	Irving Trust Co.	18.5	12	Irving Trust Co.	18.5
13	Nat'l Bk. of Detroit	17.6	13	Nat'l Bk. of Detroit	17.6
14	Hanover Bank	17.4	14	Mellon Nat'l Bk.	17.2
15	Mellon Nat'l Bk.	17.2	15	United California Bk.	16.5
16	United California Bk.	16.5	16	Crocker-Anglo	15.6
17	Crocker-Anglo	15.6	17	First Nat'l Bk., Boston	14.9
18	First Nat'l Bk., Boston	14.9	18	Cleveland Trust Co.	12.3
19	Cleveland Trust Co.	12.3	19	First Penn. Bkg.	10.4
20	First Penn. Bkg.	10.4	20	Philadelphia Nat'l Bk.	9.7
21	Philadelphia Nat'l Bk.	9.7	21	Republic Nat'l Bk.	9.4
22	Republic Nat'l Bk.	9.4	22	Harris Tr. & Sav.	8.8
	Subtotal	637.2		Subtotal	646.0
	178 Other Banks	565.9		177 Other Banks	557.1
	Total 200 Banks	1203.1		Total 199 Banks	1203.1

+ Source: DX 61.

Independent BANKERS ASSOCIATION OF AMERICA

OFFICE OF THE PRESIDENT

PHONE: 377-4080 AREA CODE: 414 GRAFTON, WISCONSIN

May 29, 1965

The Honorable William B. Proxmire
United States Senate
Washington, D. C.

Dear Senator Proxmire:

During the course of my testimony on May 21, you suggested that we could submit for the record supplementary detail as to the alternative legislative corrections we proposed. On behalf of the Independent Bankers Association of America, and as its president, I appreciate the opportunity to do this.

Attached is an illustrative amendment to the Bank Merger Act of 1960 (12 USC Sec. 1828 (c), FDIC Act, Sec. 18 (c)). We offer this as an alternative to S. 1698 which for the reasons we stated attacks the problem too drastically and in the wrong direction.

Our proposal provides that a hearing on a proposed merger will be required if one of the three advisors (the other two agencies or the Attorney General) is opposed to the merger; and if two of these three advisors are opposed, the merger shall be denied.

Requiring a hearing brings the Administrative Procedures Act into play. Experience has shown that hearings and court review are sobering and restraining influences upon regulating agencies, and are effective protection in the public interest against harmful or unwise administrative action.

The present law desperately needs this strengthening. The present procedure is largely secretive, hidden from public view, and the public usually discovers the proposal only after it is an accomplished fact, and when the only remedy left is under the antitrust law.

We pointed out in our testimony on May 21 that the approval rate under the 1960 Act is over 20 to 1, and that more mergers occurred after adoption of the Act than in a similar period before its adoption. (Statement of Mr. Brumbaugh, pp. 9, 10.) The proposals we make for hearings and court review are similar to those applying to other federal regulatory agencies under the Administrative Procedures Act.

Concerning application of the antitrust laws to bank mergers, we propose a short delay after completion of the administrative process and possible court review, within which the Attorney General must act. If he fails to act, no action could ever be brought under the antitrust law. (This idea is supported by Chairman Martin in his statement to the Committee on May 19, p. 10)

If he files an action, the effective date of the merger is postponed until the court has had a chance to consider application of the antitrust laws.

Our proposal gives primary jurisdiction to the regulatory agencies under the Bank Merger Act and relegates antitrust action to a secondary or backstop position. It also prevents the merger from becoming effective until this sequence of procedures has been completed. This is not too burdensome, and except in rare cases, the procedure will end at the administrative level.

The record shows that 782 merger applications have been made since adoption of the 1960 Act and that the Attorney General brought antitrust actions in only seven cases. In each of the seven cases the merging banks were strong banks competing with each other in the same area; in each case two or more of the advisors disapproved; in each case the proposed merger would have resulted in undue concentration, and in each case the merging banks were warned in advance that if merger occurred an antitrust action likely would follow.

The record further shows, contrary to statements of some of the proponents, that the antitrust laws will not overlook the factors other than competition which are to be considered under the 1960 Act. Both the Justice Department and the courts recognize that there are "good" mergers as distinguished from bad mergers. (Statement of Mr. Kirkpatrick, pp. 11-13)

In short, the record re-assures us that the antitrust laws will be used only against bad mergers where the public interest is seriously and adversely affected. We need the antitrust laws as a reserve and ultimate weapon against mergers approved under a Merger Act which has proved to be more of a sieve than an obstacle. We need the antitrust laws to protect the smaller banks against the ever-growing domination of

big banks in the marketplace of banking. In the Independent Bankers Association of America, most of our 6,300 member banks are smaller banks that are keenly aware of this constant threat.

As to the 2,000-odd bank mergers since 1950 which technically could be reopened under the Clayton Act, our proposed amendment in the last sentence would forgive all of these mergers and prohibit antitrust actions against them, excepting those now in the courts. This seems to be the price we must pay for having had an ineffective control of mergers in the past. But -- and we emphasize this -- we should not grant exemption for past mergers without making the corrections in the law which experience plainly demands.

We understand that the precipitating factor in the proposed legislation to exempt bank mergers from all antitrust actions, including those now pending in courts, was the decision of the trial court in the Manufacturers-Hanover Bank case in New York.

We think that the last one-third of the court decision should be required reading for all who are interested in this type of legislation. The effect of the proposed merger is summarized in the attached charts which are part of the court decision. [See p. 170, this hearing.]

These charts show that in the past ten years, the five giant banks in the New York City grew even larger by a series of mergers.

The result is that Manufacturers-Hanover would be the largest of the "big five," having 130 banking offices, or 22.3 per cent of all banking offices in the area; followed by Chase Manhatten (108 offices or 18.6 per cent); Chemical Bank (104 offices, or 17.9 per cent); First National City (81 offices, or 13.9 per cent) and Bankers Trust (47 offices, or 8.1 per cent).

If the Manufacturers-Hanover merger were to be finally approved, the end result of this merger, on top of all of the others in the past ten years in this area, would be that all banks in the area, other than the "big five," would have a total of 109 offices or 19.2 per cent, as compared with 207 offices, or 37.3 per cent at the beginning of the ten-year period.

Summarizing, this merger would give Manufacturers-Hanover 22.3 per cent of all banking offices in the area, as compared to only 19.2 per cent of offices operated by all banks other than the big five. This is an extremely aggravated case.

We understand from the Department of Justice that Manufacturers-Hanover proceeded to activate the merger after being warned that an antitrust action would be instituted. Both banking groups involved in this merger were strong competing banks and the merger cannot be justified under the factors listed in the Bank Merger Act. The proposed bill cannot be justified on the basis that it would approve this merger by rescuing it from the courts.

We would like to take this opportunity, because the time allotted in the hearings to state our opposition was short, to discuss the consideration most overlooked in these hearings, namely, the public interest.

It is claimed by the proponents that only a "balanced judgment" based on all of the factors of the Bank Merger Act, including competition, can properly serve the public interest.

Let us take a close look at the 1960 Act in this regard. The factors, other than competition, contained in the Bank Merger Act (Title 12, Sec. 1828 (c))are the same as those in the FDIC Act (12 USC 1816) which are to be considered in granting or denying insurance. These are concerned only with safety for deposits. The only factor added by the 1960 Amendment (the so-called Bank Merger Act) is the competitive factor, reading "effect of the Transaction on competition (including any tendency toward monopoly)."

These other factors (excluding competition) are mainly concerned with "problem banks" which are absorbed by another bank, thus making the wedding a "good merger" and in the public interest. No matter how worded or paraphrased, the primary purpose of these other factors is safety for the depositors' money.

We have already pointed out that the consideration making for "good mergers" are recognized by the courts and constitute defenses in an antitrust action. (Statement of Kirkpatrick, May 21, pp. 11-13) We agree with the idea of a "balanced judgment" in this sense, and we would condone the absorption of a problem bank even if the result were to make the resulting bank a stronger competitor. But, we submit, that this is the limit to which we should go in balancing all other factors against the competitive factor.

Why is competition such an important factor? Competition assures the public of alternate sources of credit, availability of loans and fair rates on loans. These are the areas of banking which intimately touch the public and make competition, or the lack of it, felt by those who use banking services. There is no regulation in these areas. True, maximum rates on savings and on loans are prescribed, but throughout our history competition has always kept loan rates below the maximums set by regulation.

It is a delusion to say that because banking is regulated it must be exempt from the antitrust laws. Those industries which are exempt from antitrust laws usually have their rates or prices fixed by government decree. If we exempt banking from antitrust laws we are inviting ultimate governmental regimentation. It has been the consistent policy of Congress, as expressed in many committee reports in the past ten years, to rely upon competition as the regulator of availability of credit at fair rates. What reason exists to reverse this policy?

We think that Chairman Martin in his statement before this Committee on May 19 correctly stated the reasoning behind the Bank Merger Act of 1960:

> "The report of your Committee in 1959 and that of the House Committee On Banking and Currency in 1960 leave no doubt that the competitive effects or possible antitrust implications of bank mergers were the major reasons prompting adoption of the Bank Merger Act. A main emphasis of the entire legislative history -- and rightly so -- is that competition is an indispensable element to a strong and progressive banking system. This and the important gaps that existed prior to 1960 in the Federal law governing bank mergers were stressed as the reasons why legislation was necessary." (Chairman Martin's statement, p.3)

Some of the proponents for this legislation contend that we must have bigger and bigger banks to meet the needs of our expanding economy. This is the hackneyed contention that has been used by the opponents of bank holding company and bank merger legislation over the years, and a contention which has been repeatedly rejected by Congress. We have enough large banks throughout the country to meet all of the needs of our economy now and as far as we can see ahead.

Correspondent banking is available to any bank of any size, and larger loans are readily made by participations on the part of two or more banks if necessary, whether located in the same area or elsewhere. These correspondent bank loans in many cases can be made as quickly as it takes to transmit the information over a telegraph wire or to make a telephone call.

A great many specious arguments have been used by proponents of this bill. We ask that the members of this committee analyze them in the light of national policy and hard facts. We respectfully urge all members of the committee to read the testimony of the witnesses appearing on behalf of the Independent Bankers Association of America on May 21. Our testimony was directed to the main contentions of the proponents for this legislation.

Finally, let it be remembered that there is nothing sacrosanct about banking which requires it to be exempt from the antitrust laws, any more than any other competitive industry, even though regulated. In fact, there is more reason for banking to be controlled by the ultimate weapon of antitrust action than any other industry, because banking is the lifeblood of our economy. It is more essential to the health of the economy than any other single industry.

Again, let me say that our Association appreciates your courtesies and this opportunity to insert in the record this supplemental material. We stand ready to help in any further way we can.

Most sincerely yours,

Ralph L. Zaun

Ralph L. Zaun
President

DATE DUE			